91-583

No.

Supreme Court, U.S.
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In the
Supreme Court of the United States

OCTOBER TERM, 1991

HUGH H. BOSWORTH, JR., WALTER HENNINGSEN, MELISSA HENNINGSEN, IRENE E.SCOTT and HENNINGSENS, INCORPORATED, on behalf of themselves and all other similarly situated taxpayers,
PETITIONERS

v.

TIMOTHY J. LEATHERS, Commissioner of Revenues; JIMMIE LOU FISHER LUMPKIN, Treasurer of the State of Arkansas; FLOYD G. "BUDDY" VILLINES III, County Judge, Pulaski County, Arkansas; PATRICIA TEDFORD, Treasurer, Pulaski County, Arkansas; PULASKI COUNTY, ARKANSAS; and the CITY OF FAYETTEVILLE, ARKANSAS; and all other similarly situated counties and cities; and AT&T COMMUNICATIONS OF THE SOUTHWEST, INC.; MCI TELECOMMUNICATIONS CORPORATION; U.S. SPRINT COMMUNICATIONS COMPANY; TMC OF ARKANSAS, INCORPORATED; LDDS OF ARKANSAS INCORPORATED; COMPUTE-A-CALL OF CENTRAL ARKANSAS, INCORPORATED, and all other similarly situated providers of long distance interstate and international telephone and telecommunications services,
RESPONDENTS

ARKANSAS TELEPHONE ASSOCIATION, INC.
INTERVENOR

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

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QUESTIONS PRESENTED

1. Were the MTS subscriber-members of the Petitioner-class of taxpayers denied their rights to Equal Protection under the Fourteenth Amendment, because § 2 of Act 27 of 1987 discriminatorily imposes Arkansas' Sales Taxes upon charges made to them for MTS interstate telephone service (but not upon charges to subscribers of WATS interstate service, which service utilizes exactly the same transmission equipment and transmits the same messages as MTS service), since the appellate courts of other states have recently found their states' general Sales Taxes unconstitutional on Equal Protection grounds, under very similar circumstances?

2. Were the members of the Petitioner-class of taxpayers denied their right to a fair opportunity to challenge the Sales Taxes in question, as guaranteed by the Due Process Clause of the Fourteenth Amendment, when the four special "appointed" associate justices (a majority) of the Arkansas Supreme Court (who were appointed to serve herein by Governor Clinton, a *defacto* party-litigant) refused to disqualify themselves from participating in this case upon the written request for recusal by the Petitioners, which request alleged the appearance of judicial impropriety; reasonably questioned the special justices' impartiality; and questioned the independence of the judiciary in this case?

PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT

Petitioners are four individuals and a small corporate business who are subscribers to MTS (basic) long distance interstate telephone services. They represent a certified class of some 800,000 taxpayer-subscribers to MTS interstate services in Arkansas. Arkansas' state and local Sales Taxes are discriminatorily imposed by Section 2 of Act 27 of 1987 (Ark. Code Ann. § 26-52-301(3)(A)) upon charges for MTS interstate services. The Petitioners are more particularly described as:

Petitioner Hugh Bosworth is an individual and a resident of Lonoke County, Arkansas. Petitioners Irene E. Scott, Melissa Henningsen, and Walter Henningsen are individuals and residents of Little Rock, Pulaski County, Arkansas. These four taxpayers are subscribers to MTS long distance interstate telephone and telecommunications services.

Petitioner Henningsens, Inc. is a corporation created under the laws of Arkansas that has no subsidiaries or affiliates. This corporate taxpayer operated a full service automobile garage in Little Rock, Arkansas, and was a subscriber to MTS long distance interstate telephone and telecommunication services.

Respondents are representatives of two separate certified subclasses comprised of: (1) state officials charged by law with the collection, administration and distribution of Arkansas' Sales Taxes or officials of local cities and counties in Arkansas wherein local option Sales Taxes are imposed (all of whom are defendants in their official capacities); and (2) a group of corporate entities that are involved in the business of providing long distance interstate telephone and telecommunication services in Arkansas (and are therefore required by law to collect the challenged state and local Sales Taxes from the 800,000 taxpayer-subscriber members of the Petitioner-class). The Respondents are more particularly described as follows:

Respondent Timothy J. Leathers is the currently serving Commissioner of Revenues of the Revenue Division of the Arkansas Department of Finance and Administration. He is the person who is charged by statute with administering the state and local Sales Taxes imposed in Arkansas.

Respondent Jimmie Lou Fisher Lumpkin is the duly elected Treasurer of the State of Arkansas and the person who is charged with disbursing tax funds to state agencies and to county and municipal governments where local option taxes are collected.

Respondents Floyd G. "Buddy" Villines and Patricia Tedford are the County Judge and Treasurer, respectively, of Pulaski County, Arkansas, a county wherein a local option county Sales Tax is imposed.

Respondent City of Fayetteville, Arkansas, is a municipality wherein a local option municipal Sales Tax is imposed.

Respondents AT&T Communications of the Southwest, Inc.; MCI Telecommunications Corporation; U.S. Sprint Communications Company; TMC of Arkansas, Incorporated; LDDS of Arkansas Incorporated; and Compute-a-Call of Central Arkansas, Incorporated, are corporate entities that are involved in the business of providing long distance interstate and international telephone and telecommunication services to Arkansas subscribers. By Arkansas statute, these long distance telephone service providers are required to collect the challenged state and local Sales Taxes from members of the Petitioner-class of taxpayers and remit the same to the Commissioner of Revenues.

Intervenor Arkansas Telephone Association, Inc. is an independent corporation that has no subsidiaries or affiliates and is a trade organization composed of approximately 29 local telephone companies supplying local telephone service to taxpayer-subscribers in Arkansas.

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ARKANSAS TELEPHONE ASSOCIATION, INC.
INTERVENOR

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

Hugh H. Bosworth, Jr., et. al., respectfully petition for a Writ of Certiorari to review the judgment of the Supreme Court of Arkansas in this case.

OPINIONS

The opinion of the Supreme Court of Arkansas (App. B, *infra*, 2a) is reported at 305 Ark. 598, 810 S.W.2d 918. The Order of the Supreme Court of Arkansas denying the petition for re-hearing is unreported (App. A, *infra*, 1a).

The Findings of Fact, Conclusions of Law, Order and Judgment (App. E, *infra*, 19a) of Chancellor Ellen B. Brantley of

the Pulaski County Chancery Court entered on May 19, 1989, are unreported.

JURISDICTION

The judgment of the Supreme Court of Arkansas (App. B, *infra*, 2a) was rendered on June 3, 1991, and a Petition for Rehearing was timely filed by the Petitioners and denied on July 1, 1991 (App. A, *infra*, 1a). The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. § 1257(a).

CONSTITUTIONAL, STATUTORY AND JUDICIAL CODE PROVISIONS INVOLVED

U.S. Constitution:

Amendment 14, § 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Arkansas Constitution:

Art. 7, § § 1, 4 and 9, are set forth in full in App. F, *infra*, 37a.

Statutes:

Ark. Code Ann. § 26-52-301(3)(A) (as it appeared both before and after the questioned amendment) is set forth in full in App. G, *infra,* 39a.

Judicial Code:

Canons 1, 2, 3, 7 and the Addendum of the Arkansas Code of Judicial Conduct (adopted by *per curiam* orders of the Arkansas

Supreme Court on November 5, 1973, and June 6, 1988) are set forth in App. I, *infra*, 45a.

STATEMENT OF THE CASE

a. Arkansas' Sales Tax on Telephone Service

Prior to the adoption of § 2 of Act 27 of 1987 on February 11, 1987, Arkansas' statutory scheme of Sales Taxes imposed these taxes only upon the charges made to subscribers for *local* telephone services and for *intrastate* long distance telephone services. No Arkansas Sales Taxes were imposed upon charges made by long distance carriers for providing *interstate* and *international* telephone and telecommunications services to Arkansas subsribers. By 1987, more than half of the municipalities and counties in Arkansas also imposed local option Sales Taxes upon the same services that were subjected to the state Sales Taxes.

During the Arkansas General Assembly's regular session in 1987, S.B. 196 was introduced as an "administration bill" (i.e. one sponsored by Governor Clinton as the head of the Executive Department of Arkansas' state government). (R. 298–300; 316–318) Section 2 of S.B. 196, as originally introduced, provided that *all* telephone service, i.e. local, intrastate long distance and interstate long distance services, purchased by Arkansas subscribers would have been subjected to Arkansas' 4% Sales Tax. However, during the two weeks § 2 of S.B. 196 underwent the legislative process, it was amended on three occasions, and was finally enacted into law as § 2 of Act 27 of 1987 on February 11, 1987. [1] (App. H, *infra*, 42a) The practical effect of the adoption of § 2 of Act 27 of 1987 was to extend Arkansas' state and local Sales Taxes to charges made by long distance telephone carriers for providing MTS (basic) interstate telephone service to Arkansas' residential and business subscribers. However, charges for WATS or WATS-

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[1] It is important to note that an AT&T corporate counsel admitted in writing (before this suit was filed) that AT&T's lobbyists and legislative research personnel were involved in the legislative process on Act 27 of 1987. (SR 15)

like or Private Line long distance interstate services sold to both residential and business subscribers were specifically excluded from such Sales Taxes by the provisions of the Act. The Director of the Department of Finance & Administration estimated that this extension of Arkansas' Sales Taxes to out-of-state long distance service charges would generate an additional $5.0 million in "new" state revenue per year.

In early March of 1988, after the provisions of § 2 of Act 27 of 1987 had been in effect for approximately a year, the Petitioners (four individuals, Messrs. Bosworth and Henningsen, and Ms. Henningsen and Ms. Scott, and Henningsens, Inc., an Arkansas corporation operating a small full service automobile garage), all subscribers to only MTS interstate long distance telephone services, instituted this class action suit in Pulaski County Chancery Court (under the "illegal exaction" provisions of Art. 16 § 13 of the Arkansas Constitution) to challenge the constitutionality of the state and local Sales Taxes imposed by § 2 of Act 27 of 1987.[2] The Petitioners' Complaint alleged that the discriminatory imposition of Arkansas' Sales Taxes upon the MTS type of interstate long distance services (and not upon the similar WATS type of interstate services) violated their rights to enjoy the equal protection of the laws under the Fourteenth Amendment of the U.S. Constitution. [3]

The Respondents named in this class action represent two separate subclasses: (1) the officials of the State of Arkansas who are required by law to administer, collect and disburse the

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[2] The Petitioners are not challenging: (1) Arkansas' Sales Taxes imposed upon charges for *intrastate* long distance telephone service (all types are taxed), or (2) the fact that these Sales Taxes were not imposed upon charges for interstate long distance telephone services provided by Private Line Service, which service cannot be accessed by the general public (See ftnt. 4, *infra*).

[3] The Petitioners also alleged in their Complaint that § 2 of Act 27 of 1987 violated the provisions of the Commerce Clause of the U.S. Constitution. The denial of their Commerce Clause cause of action by the trial court was not appealed by the Petitioners, following this Court's decision in the case of *Goldberg v. Sweet*, 488 U.S. 252 (1989).

challenged Sales Taxes, and representatives of the counties and municipalities in Arkansas where local option Sales Taxes are imposed; and (2) the companies who are providers of long distance interstate telephone services (interexchange carriers (IXCs)) in Arkansas that are required by law to collect the challenged Sales Taxes from their subscribers. The Arkansas Telephone Association, Inc. intervened because each of its 29 local exchange carrier (LEC) telephone company members act under various contracts as collecting and remitting agents for one or more of the IXC's with regard to the state and local Sales Taxes in question.

The Petitioners' suit was certified as a class action; the trial court Chancellor denied the Petitioners' request that the challenged Sales Taxes be escrowed; but she did enjoin the IXCs and their agents to maintain billing records, so as to be able to identify the amounts of Sales Taxes paid monthly by their subscribers for MTS interstate long distance service.

At various pretrial evidentiary hearings and at the trial in this case, extensive testimony (either *ore tenus* or by stipulation), stipulations of fact, and documentary evidence were introduced regarding the technical aspects of the various types of interstate and international long distance telephone services provided by the various IXC's to their Arkansas subscribers; how the challenged Sales Taxes were administered by both the Arkansas Revenue Division and these IXC's; and how the various IXCs determined whether the challenged Sales Taxes described in the statute were applicable to the various interstate telephone services they provided.

The evidence herein established that there are two generally recognized types of telephone service subscribers; i.e. *residential* and *business*, each with different rate structures, etc. It was also established that a long distance interstate telephone transmission originates at the subscriber's station (telephone); is transmitted to the LEC's central switching station; and then to the designated IXC's long distance switch. The interstate transmission is then carried by wire, fiber optic cable, microwave or satellite transmission to the IXC's long distance switch in the receiving state; where the signal is picked up by the LEC and transmitted

through its system to the receiving subscriber's station. The total charge for such a long distance interstate telephone transmission is billed to either the originating or receiving subscriber's number; but this charge is divided by FCC and state PSC regulated rates among the originating LEC, the IXC and the receiving LEC. The IXC must pay both the originating and receiving LECs an "access fee" for the right to utilize the local phone systems as part of the interstate transmission.

Some IXCs (e.g. AT&T, MCI and US Sprint) own their own transmission facilities and are referred to within the industry as "facility based carriers." Other IXCs (e.g. Compute-a-Call of Central Arkansas) own no transmission facilities at all; they merely purchase large blocks of WATS services from the "facility based" IXCs and "resell" these long distance services to their subscribers. These IXCs are generally referred to within the industry as "re-sellers." Finally, a third type of IXC (e.g. LDDS of Arkansas) owns some of its transmission facilities and also buys and resells WATS services provided by the "facility based" IXCs.

Generally, the types of, and rates for, long distance interstate telephone services provided by the IXC (under authorization of the FCC or state PSCs) are classified for utility regulation purposes as: (1) MTS, (2) WATS (and WATS-like) and (3) Private Line Services. It was generally accepted from the evidence introduced in this case that the MTS and WATS services were accessible by the general public from any station (telephone); that there were no longer dedicated transmission lines for WATS services; and that today these MTS and WATS classifications were generally differentiated *only* for rate purposes, since both of these types of long distance services utilized exactly the same telephones, transmission lines and switching equipment of both the LECs and the IXC's to transmit the subscriber's interstate messages of voice, data, or images on either MTS or WATS services. The rates for both the MTS and WATS services were time of day, day of week, length of time used, and distance sensitive (with the WATS services having a lower rate per call), but a flat reoccurring

monthly charge was added to the WATS service. [4] (R. 340–342; 583–585)

The General Manager for TMC of Arkansas, Inc. (one of the combination "resellers" and "facility based" IXC's) and Petitioner Melissa Henningsen testified that the reoccurring flat

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[4] The generally understood and accepted description of MTS, WATS and WATS–like, and Private Line Services by the parties in this suit can be described as follows:

(a) *Message Telecommunication Service*. MTS type of service is the regular or basic long distance service provided by all IXCs and is available to any consumer–subscriber in Arkansas. The charge for the MTS type of long distance service is measured by the distance and length of time on each individual call, and the rate per minute on each long distance call varies based upon the time of day and day of week on which the long distance call is placed. This MTS type of service is provided both intrastate and interstate to Arkansas subscriber–customers of the long distance carriers. The MTS service can be used to transmit voice, data or images. This MTS service can be accessed from any station (telephone).

(b) *Wide Area Telecommunication Service* (WATS). WATS service is a long distance service that is available to any customer–subscriber in Arkansas to transmit voice, data and images within a designated geographic area, known as a service area or band. The WATS service can be either an out–bound service or an in–bound 800 service. This 800 service allows the subscriber–customer of a long distance company to receive voice, data or image transmissions at its location in Arkansas directly from callers within the designated geographic area known as a service area or band. WATS long distance service or 800 long distance service each have a monthly reoccurring flat charge, plus a charge (like the MTS charge) that is a per call charge based upon the time of day and day of week on which the long distance call is placed, the length of time the WATS service is utilized on each call, and the geographic distance covered by each call. This WATS service can be accessed from any station (telephone).

(c) *Private Line Service*. Private Line Service is a service which is a dedicated point–to–point service between two specific locations. Access to this service from other telephone lines is not available, on either the originating or terminating end. Calls to or from points not connected by a private line must be provided over some other type of telephone service. Voice, data or images may be transmitted by Private Line Service. The charge for Private Line Service is a flat rate per month which charge is not usage sensitive.

monthly charge for WATS and WATS-like services made it uneconomical for both residential and business subscribers with a low volume of out-of-state long distance telephone calling needs to subscribe to WATS service. Thus, there is a "break even" point at which the interstate WATS services become economically practical to be utilized, based strictly upon a higher volume of out-of-state long distance services needed, by either residential or business subscribers. It is undisputed that *both* residential or business subscribers can subscribe to either MTS or WATS services (there being no prohibition by the regulatory agencies); that most WATS service subscribers also subscribe to some MTS service at the same time; and that most residential and business long distance users with low volume interstate calling needs subscribe only to MTS services. (R. 218-219; 226-230; 246-247; 340-342)

The General Manager of TMC also testified that, because the wording of § 2 of Act 27 of 1987 excludes WATS and WATS-like services from Arkansas' Sales Tax base, that his company's comparably priced MTS or "basic" long distance interstate services were placed at a competitive pricing disadvantage to AT&T's (and the other "facility based" IXC's) WATS line charges, due solely to the extra differential of the 4% to 5% Sales Taxes being imposed upon the "reseller's" basic long distance services and not upon these WATS services provided by the "facility based" IXCs. [5] (R. 229-230)

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[5] The General Manager of TMC testified, in response to questions from Petitioners' counsel (R. 229-230):

Q: In your offering, or TMC's offering of its regular service, do you compete on a price level with any other companies' WATS line services?

A: Price is probably the biggest consideration.

Q: Well, particularly with the application of the tax in this instance, have you made a determination that the tax of five percent has any effect upon the competitiveness or the price being able to be offered by TMC for its basic services versus other services that you compete with?

A: I have. There is not necessarily a one to one relationship with our products and our competitors' products. For example, our basic service may be competitive

At the close of the trial on December 13, 1989, Chancellor Brantley, in her oral discussions with counsel for all parties held against the Petitioners on their Equal Protection Clause cause of action because she held that states were to be given a wide latitude under the Equal Protection Clause to differentiate among classes of taxpayers, and that even a classification based solely upon a regulatory agency's rate structure was sufficient to justify the discriminatory imposition of Arkansas' Sales Tax. However, she closed her discussion by stating (R. 646):

> THE COURT: That's my only recollection of the testimony, and, quite frankly, I want this opinion to be honest. If the Supreme Court doesn't believe that this is enough to allow a different taxing system, then I want them to reverse me. I mean, I do not find that you can tell any difference between MTS and WATS based on anything other than how they are billed, and your election to be billed one way or another depends upon the telephone service outside of local exchanges. [6]

On May 19, 1989, the Chancellor entered her Findings of Fact and Conclusions of Law, Order and Judgment, dismissing the Petitioners' Complaint. (App. E, *infra*, 19a) A Notice of Appeal from this decision was timely filed by the Petitioners to the Arkansas Supreme Court.

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with AT&T WATS service. There is a competitive situation there in that we do charge, and [I] feel like that we have to charge, the five percent sales tax on our basic service, where AT&T does not have to charge the sales tax on their WATS service. So, if all other things were equal, we would be at a five percent disadvantage simply with that situation. And, again, that stairsteps up moving from one product to another competitor, but similarly situated products, one could have the sales taxes applied and one would not have the sales tax applied.

[6] The full test of the trial court Chancellor's discussion with counsel on this point is set out as Appendix J, *infra*, 51a.

b. Due Process Issue

After the issues on appeal to the Arkansas Supreme Court had been fully briefed by all parties and the case had been set for oral argument on November 12, 1990, a majority (four of seven) of the "elected" justices of the Arkansas Supreme Court notified the clerk of that court, in writing, that they were recusing from further participation in this case. In the respective justices' letters of recusal, no reasons were stated for their self determined disqualifications in this case.

Based upon the provisions of Canon 3D of the Arkansas Code of Judicial Conduct (App. I, *infra*, 45a), the Petitioners herein requested (by motion and brief filed on November 19, 1990) that the four recusing justices of the Arkansas Supreme Court reconsider their decisions to disqualify, or, alternatively, that they state for the record in this case the reasons for their individual recusals, so that the parties hereto, independent of these justices, could decide whether such reasons for disqualification could be waived by agreement of the parties. None of the Respondents filed any type of response to the Petitioners' motion in this regard. The Arkansas Supreme Court denied the Petitioners' request for reconsideration in this regard by Order entered on December 10, 1990. (App. C, *infra*, 15a) On December 11, 1990, pursuant to the provisions of Art. 7 § 9 of the Arkansas Constitution, the Chief Justice of the Arkansas Supreme Court wrote to Governor Clinton requesting that he appoint four attorneys to serve as special associate justices in this particular case.

In response to this written request, in letters dated February 1, 1991, Governor Clinton appointed Ms. Elrod and Messrs. Byrd, Pilkinton and Glover to sit as special justices in this case. These special associate justices were chosen by Governor Clinton from a standing list of approximately 100 Arkansas lawyers submitted to the Governor's office by the Judicial Nominations Committee of the Arkansas Bar Association. The Petitioners' counsel filed written requests on March 15, 1991, under the Arkansas Freedom of Information Act, with both the Office of Governor Clinton and with the ABA Judicial Nominations Committee requesting that either or both entities state what requirements or standards were

used in picking these four special associate justices to serve in this case. Both the Office of Governor Clinton and the Chairman of the ABA Committee declined, in writing, to state what standards or requirements were used or what contacts were made in choosing these four special associate justices to sit in this case.

Subsequently, on March 29, 1991, the Petitioners filed a formal Motion Suggesting Disqualification of All Special Associate Justices Appointed by Governor Clinton, and asking all four special associate justices to recuse in this case. The documents attached to the Petitioners' Motion established that Ms. Elrod's spouse (and law partner) and Mr. Pilkinton's mother and father (and law partner) had recently made substantial campaign contributions to Governor Clinton's successful 1990 reelection campaign. The Petitioners also established that the legislative Act in question (§ 2 of Act 27 of 1987) had been an "administration bill" promulgated and sponsored by Governor Clinton and his executive staff; and that the constitutionality of this Act had been defended in this action by Governor Clinton's politically appointed Commissioner of Revenues (i.e. James C. Pledger). Therefore, the Petitioners submitted that all four special associate justices, under the circumstances then present, could not serve without there being an appearance of impropriety or bias, since they were appointed by Governor Clinton who was, at least, a *de facto* litigant in this case. Finally, it was noted that Mr. Glover had, within the year, been appointed as a special associate justice in another "illegal exaction" class action tax case (also involving Petitioners' counsel herein) and that he had written the Court's opinion reversing the victory that the members of the taxpayer-class had secured in the trial court.

The Petitioners alleged in their motion that allowing a litigant in a case to appoint a majority of the Court that would pass upon the constitutionality of § 2 of Act 27 of 1987 (especially where that party refused to state what standards had been used or what contact had been made with such lawyers (and other lawyers not chosen) in appointing the four attorneys to serve in this case) presented circumstances that denied the Petitioners their right to due process of the laws, under the provisions of the Fourteenth Amendment of the U.S. Constitution. The Petitioners also alleged that these appointments by Governor Clinton compromised the

independence of the judiciary and violated the constitutional principle of the separation of powers.

The Petitioners requested that, if these four special associate justices would recuse, then both Governor Clinton and Lt. Governor Tucker (a partner in the law firm representing US Sprint herein) should disqualify from exercising the powers of appointment (under Art. 7, § 9 of the Arkansas Constitution), and, therefore, allow the constitutional power to appoint these four special associate justices to devolve to the president *pro tempore* of the Arkansas Senate. Alternatively, the Petitioners renewed their request that the four regularly "elected" justices reconsider their prior decision and state on the record their reasons for recusing, so as to allow the parties to independently determine whether they could waive such disqualifications. Finally, the Petitioners requested that the Arkansas Supreme Court exercise its general supervisory powers granted in Art. 7 § 4 of the Arkansas Constitution (App. F, *infra*, 37a) to appoint "elected" members of the Arkansas Court of Appeals or "elected" trial judges in Arkansas to fill the four vacancies created by the recusal of the "elected" associate justices of the Arkansas Supreme Court. The Petitioners alleged that there were no other ways to avoid this constitutional conflict and crisis, under the circumstances presented by Governor Clinton's involvement in the appointment of special associate justices to the Court in this case. By Order entered on April 15, 1991 (App. D, *infra*, 17a), the Arkansas Supreme Court denied the Petitioners' requests in this regard and set the case down for oral argument on April 22, 1991.

c. Arkansas Supreme Court's Decision

In an Opinion written by Special Associate Justice Georgia Elrod, and joined in by the three other special associate justices appointed by Governor Clinton, the Arkansas Supreme Court affirmed the trial court Chancellor's decision that the Petitioners had not met their burden of proof that § 2 of Act 27 of 1987 violated their rights of Equal Protection under the Fourteenth Amendment of the U.S. Constitution. Relying upon this Court's then recent decision in the case of *Leathers v. Medlock*, 111 S. Ct. 1438 (1991), the Arkansas Supreme Court refused to apply a "heightened

scrutiny" standard to the Petitioners' challenge to the discriminatory imposition by § 2 of Act 27 of 1987 of Arkansas' Sales Taxes on charges made by the various IXCs for providing MTS and WATS long distance interstate telephone services to the individual members of the Petitioner–class of taxpayers. Instead, applying its interpretation of the "rational basis test" prescribed for use by this Court in Equal Protection Clause challenges to state taxes, the Arkansas Supreme Court hypothesized (based upon its reading of the evidentiary record established herein), that:

> The Legislature may have intended, in the enactment of § 2 of Act 27 of 1987, to encourage large volume users of telephone service, i.e. WATS subscribers, to remain or relocate in Arkansas. We agree with the Chancellor's finding that this basis for the legislation would be rationally related to achieving a legitimate governmental objective [providing tax incentives to commerce as a means to encourage businesses to stay and locate in this state].

The Petitioners filed a timely Petition for Rehearing alleging that: (1) there was no legitimate state purpose served by a tax policy that (a) merely encouraged a high volume use of interstate long distance telephone service, or (b) resulted in granting "facility based" IXCs a competitive pricing advantage over "resellers;" and (2) that, if encouraging business development was the state's purpose for adopting § 2 of Act 27 of 1987, there was no rational relationship between that and the classification of excluded WATS services created by § 2 of Act 27 of 1987, since all Arkansas businesses do not benefit from such classification. Such Petition for Rehearing was denied by Order of the Arkansas Supreme Court on July 1, 1991. (App. A, *infra*, 1a).

REASONS FOR GRANTING THE PETITION

The Petitioners submit that the two questions presented in this case establish that there are conflicts between the opinion here by the Arkansas Supreme Court, and opinions of this Court and other state appellate courts regarding the proper application of (1) the "rational basis test" of the Equal Protection Clause in challenges to state taxes and (2) the Due Process Clause in allowing a contesting taxpayer to secure a fair hearing. Thus, important reasons, as described by Rule 10.1(a), (b) and (c) of this Court's Rules, exist here to warrant the granting of the Petitioners' Writ. The Arkansas Supreme Court's failure to properly apply any *objective* standards to the facts and law presented in this class action case, as required by this Court's prior decisions, has resulted in a decision in this case that is in direct conflict with a recent decision of the Wisconsin Supreme Court involving virtually the same factual situation. The violation of the Petitioners' due process rights by the appointment of special associate justices of the Arkansas Supreme Court, by what amounts to a *de facto* party-litigant and the refusal of such special justices to recuse upon the request of the Petitioners, creates the appearance of impropriety, reasonably raises the question of the lack of impartiality on the part of such "appointed" special justices, and brings the independence of the judiciary seriously into question. The answers to the questions raised here by the Petitioners can only be supplied by a ruling of this Court, and the Petitioners submit that a decision by this Court on both of the questions they have raised will provide precedents of substantial national importance.

The Petitioners acknowledge that the State of Arkansas has the power to impose a Sales Tax upon charges for long distance interstate telephone services. (Ark. Code Ann. § 26-52-301(3)(A)) However, Arkansas' statutory scheme for imposing these statutory taxes (like that of a growing number of its sister states) does not impose these excise taxes equally upon similarly situated subscribers who should be grouped into the same class, because of the arbitrary exclusion from the Sales Tax base of charges for WATS and WATS-like interstate services. The Petitioners submit that a classification of taxpayers, based solely upon the regulatory rate structure, does not further a legitimate state purpose, and that

the practical effect of the statutory scheme (in its "actuality of operation") is to grant a competitive pricing advantage to facility based IXCs; clearly not a legitimate state purpose. Even assuming, as the Arkansas Supreme Court appears to have held, that the purpose of § 2 of Act 27 of 1987 was to encourage economic development of business within Arkansas (an acknowledged legitimate purpose), the classification resulting from the exclusion of interstate WATS services from the tax base is not rationally or reasonably related to this purpose that has been "hypothesized" by the state supreme court, because not all businesses are provided the benefit.

Forty-five states and the District of Columbia impose some sort of Sales Tax (or other gross receipts based excise tax) upon charges for telephone service. Many thousands of local governmental entities also impose similar local option excise taxes upon telephone service. The amount of Sales Taxes in question in this case alone now exceeds more than $20.0 million, and that figure must be multiplied several times over because of the fact that this same discriminatory statutory scheme for imposing Sales Taxes on charges for interstate telephone service has now been adopted in several other states.

Thus, the Petitioners believe that the Equal Protection question presented here is of substantial national importance to millions of taxpayers who are subscribers to long distance interstate telephone services and that this Court should grant the petition and render a decision giving guidance in this complex area where none exists at this time. The Petitioners also submit that an exercise of this Court's supervisory powers over the state courts is the only way that the Due Process question presented here can be answered, since there is no other effective way to secure a review of an exercise of discretion by state supreme court justices, under circumstances as are presented here.

I. A CONFLICT EXISTS BETWEEN THE DECISION IN THIS CASE AND DECISIONS BY APPELLATE COURTS OF OTHER STATES IN EQUAL PROTECTION CLAUSE BASED CHALLENGES TO STATE TAXES

IMPOSED UPON TELEPHONE SERVICES AND THE DECISION OF THE ARKANSAS SUPREME COURT IS ERRONEOUS.

The Petitioners acknowledge that this Court's previous decisions have long ago established in a taxpayer's Equal Protection based challenge to a state tax, that great deference and wide latitude will be given by the Court to the state legislatures' decisions to create different classifications of taxpayers to meet local economic and regulatory needs; that the classifications will be presumed constitutional and approved if the Act advances a legitimate state purpose and the resulting classifications are reasonably related to that state purpose; that the classifications do not have to be drawn with mathematical precision; and, finally, that a heavy burden of proof is placed upon the challenging taxpayer to establish that the questioned classifications are palpably arbitrary and do not advance a legitimate state purpose. See, *Allegheny Pittsburgh Coal Co. v. County Commissioner*, 488 U.S. 336 (1989); *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356 (1973); *Allied Stores of Ohio v. Bowers*, 358 U.S. 522 (1959); *Madden v. Kentucky*, 309 U.S. 83 (1940); and *Carmichael v. Southern Coal Co.*, 301 U.S. 532 (1937).

Though the Petitioners acknowledge that the violation of the Equal Protection Clause by a state tax is probably the hardest constitutional issue for a challenging taxpayer to establish, they submit that there are still "objective" standards that the challenged tax statute must meet under the "rational basis" or "minimum scrutiny" test. To pass constitutional muster, the classification must be reasonable, not arbitrary; it must rest upon some ground of difference having a fair and substantial relation to the object or purpose of the legislation; the classification cannot be palpably arbitrary, feigned or illusory; and the ultimate controlling issue is whether all taxpayers that are within the classification created are treated alike. *Allied Stores of Ohio, supra*, 358 U.S. at 527; *Walters v. City of St. Louis*, 347 U.S. 231, at 237 (1954); and *Royster Guano Co. v. Virginia*, 253 U.S. 412, at 415 (1920).

There have been a number of previous decisions rendered by this Court where state or local taxes were declared to have

violated the provisions of the Equal Protection Clause, either because (1) there was no legitimate state purpose served by the classification (*Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869 (1985); *WHYY v. Glassboro*, 393 U.S. 117 (1968); and *Wheeling Steel Corp. v. Gladner*, 337 U.S. 562 (1949)); or (2) the classification was found to be palpably arbitrary, feigned or illusory, and therefore not reasonably related to an otherwise legitimate state purpose (*Allegheny Pittsburgh Coal Co., supra; Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985); *Williams v. Vermont*, 472 U.S. 14 (1985); *Zobel v. Williams*, 457 U.S. 55 (1982); *Stewart Dry Goods Co. v. Lewis*, 294 U.S. 550 (1935); and *Royster Guano Co. v. Virginia*, 253 U.S. 419 (1920)).

The Petitioners submit that the classification created by § 2 of Act 27 of 1987 fails the two part "rational basis test" laid down by this Court, because there is neither a legitimate state purpose served by (1) merely encouraging the high volume usage of interstate telephone service, or (2) creating a competitive pricing advantage for "facility based" IXCs over their "reseller" competitors. See, *Metropolitan Life Insurance Co., supra*, *WHYY, supra*, and *Wheeling Steel Corporation, supra*. [7]

a. Conflict with Decisions of Other State Appellate Courts

The Petitioners submit that the decision of the Arkansas Supreme Court in this case conflicts directly with the very recent decision of the Wisconsin Supreme Court in the case of *GTE*

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[7] The Petitioners also originally argued before the Arkansas Supreme Court that the "heightened scrutiny" and "compelling interest" standards should be applied in this case because their First Amendment rights of "free speech" were being abridged by the discriminatory application of the Sales Tax. However, the Petitioners acknowledge that this Court's intervening decision in *Leathers v. Medlock*, 111 S. Ct. 1438 (1991) succinctly stated that a First Amendment issue was not involved under such circumstances. However, the Plaintiffs do note that this Court has already acknowledged the seriousness of a possible Equal Protection violation in this type of situation because the Equal Protection issue was remanded in *Medlock*.

Sprint Communications Corp. v. Wisconsin Bell, Inc., 454 N.W.2d 797 (Wis., 1990), regarding the proper interpretation and application of Equal Protection standards in a challenge to a general Sales Tax imposed upon charges for telephone service. The *GTE Sprint* case was cited to the Arkansas court by the Petitioners, but the court chose not to comment upon this Wisconsin decision, though it is the *only* comparable reported case addressing the question presented in this litigation. In the *GTE Sprint* case, Wisconsin's statutory scheme imposed the state's general Sales Tax upon "access fees" charged by LECs to IXCs, but *not* upon charges for the same "access fees" made by the LECs to "resellers" or other LECs. The practical effect of this statutory scheme was to grant a competitive advantage to the "resellers" over the IXCs, solely because of the Sales Tax expense. Exactly the opposite competitive situation results in this case.

In the *GTE Sprint* decision, the Wisconsin Supreme Court considered and applied all of the proper presumptions mandated by this Court's decisions in *Madden, supra; Allied Stores of Ohio, supra;* and *Allegheny Pittsburgh Coal Co., supra;* but that court also recognized and applied the "objective" standards set forth by this Court's *Walters v. City of St. Louis, supra,* decision. In applying these standards to the three purposes offered by the state revenue department to justify the discriminatory imposition of the state's general Sales Tax, the Wisconsin Supreme Court found that there was nothing unique about the sale of access services to IXCs, resellers and other LECs; that all such businesses should be considered to be in the same class for purposes of this Equal Protection Clause challenge; and that the classifications created by the challenged Sales Tax statute were totally arbitrary and violated the Equal Protection rights guaranteed to GTE Sprint. The remedy ordered by the Wisconsin Supreme Court was a refund and abatement of any further Sales Taxes against GTE Sprint and the other IXCs. [8]

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[8] The Petitioners believe that it is extremely important for this Court to note that U.S. Sprint (previously GTE Sprint) strenuously argued inconsistent positions on the application of the Equal Protection Clause before the Wisconsin and Arkansas Supreme Court. In Wisconsin, U.S. Sprint was placed at a competitive disadvantage and its economic interests were adversely affected; but, in Arkansas,

Similarly, the Petitioners submit that the decision of an Illinois intermediate appellate court in the case of *Satellink of Chicago, Inc. v. City of Chicago*, 523 N.E.2d 13 (Ill. App. 1 Dist., 1988) is also in direct conflict with the Equal Protection analysis of the Arkansas Supreme Court in this case. In the *Satellink* case, the operator of a SMATV subscription television service was found to have had its Equal Protection rights violated by the provisions of Chicago's 4% gross receipts based amusement tax ordinance that imposed this tax upon charges made for the delivery of television programming services by the SMATV operator, but specifically excluded from the tax base charges made by cable television operators in providing the same television programming. The Illinois appellate court also conducted a detailed Equal Protection analysis, considered and applied all of the presumptions of statutory validity and burden of proof required by this Court's decisions, but, like the Wisconsin Supreme Court in the *GTE Sprint* case, the Illinois court also noted and applied the "objective" standards set out in this Court in its *Royster Guano Co.* case, *supra*. The Illinois court found that there was no significant difference in the television programming service offered by the SMATV operator and the cable operator, and that the classification created by the City of Chicago's ordinance had no rational basis and, therefore, violated the SMATV's Equal Protection rights. The Illinois court made it clear that its decision was being made under the provisions of the Equal Protection Clause of the Fourteenth Amendment, not under the "free press" and "free speech" clauses of the First Amendment. [9]

U.S. Sprint (and the other "facility based" IXCs (e.g. AT&T and MCI)) have achieved a competitive pricing advantage over the "resellers" and are entitled to retain 2% of the total Sales Taxes collected on MTS interstate service (Ark. Code Ann. § 26-52-503). These inconsistent briefing position taken by this IXC were pointed out to the Arkansas Supreme Court by Petitioners' Motion Requesting Judicial Notice. (Arkansas Supreme Court Order of April 15, 1991 (App. D, *infra*, 17a))

[9] The Petitioners submit that the supreme courts of a number of Arkansas' sister states have also recently rendered decisions holding various of their respective states' taxes to have violated Equal Protection Clause standards, where those courts have also applied "objective" standards to make sure that all

Therefore, the Petitioners submit that there is a clear conflict between the decision by the Arkansas Supreme Court here and the decisions by the appellate courts of Arkansas' sister states in the application of Equal Protection standards where taxpayers are challenging taxes imposed upon services rendered in the ever evolving technological area of electronic communication. This Petition for Certiorari should be granted to set the exact standards that can be applied in instances involving communication services sold by these burgeoning electronic communication industries.

b. The issue presented here is important to all states in the administration of Sales Taxes on telephone and other electronic communication services.

Within the last twenty years, there has been a virtual explosion in new methods and means of electronic communication, both in the telecommunication and broadcast industries. These include satellite and cable television transmissions of television services, and the wireless transmission of telephone services by satellite and cellular means. These new types of electronic communication services have generated whole new industries, and charges are made for many new classifications of these services that did not even exist twenty years ago. Many state and local governments, in their search for new revenues, are beginning to apply both general and special excise taxes upon some or all of these new communications services. There has been no decision rendered by this Court, to date, involving an Equal Protection challenge to the statutory schemes for imposing general or special taxes upon these new communications services.

As with the discriminatory taxation of cable and satellite television subscription services in the *Medlock* case (where the same television programming was provided to the subscribers to both services in virtually the same manner), the discriminatory

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taxpayers within the same class were treated equally. See, *Northern Natural Gas Co. v. Board of Equalization and Assessment*, 443 N.W.2d 249 (Neb., 1989); *Amex Magnesium Corp. v. State Tax Commission*, 496 P.2d 1256 (Utah, 1990); and *Associated Grocers, Inc. v. State*, 787 P.2d 22 (Wash., 1990), *cert. denied*, *Washington v. Associated Grocers, Inc.*, 111 S. Ct. 670 (1991).

taxation of long distance interstate telephone services that are provided over exactly the same equipment, transmitting the same voice, data and image messages, causes the same Equal Protection question to be raised here when Arkansas taxes MTS interstate telephone services, while the same WATS interstate telephone services are excluded from the Sales Tax base.

This Court should note that the very same statutory scheme for taxing MTS and WATS interstate telephone services differentially has recently been adopted in the states of Minnesota and Tennessee. [10] Likewise, some states have now begun to adopt statutes that impose their general Sales Taxes upon charges for "premium" and "pay per view" cable television services, but not upon charges for "basic" cable services. [11]

This Court recently addressed a Commerce Clause question in a challenge to a state tax imposed upon charges for interstate telephone services in *Goldberg v. Sweet*, 488 U.S. 252 (1989), but an Equal Protection Clause issue was not involved. The Petitioners submit that there is great need for guidance to subscribers to these electronic services, to the providers of such electronic services, and to state legislatures and revenue departments, as to where proper classifications can legitimately be made for Equal Protection purposes, in the taxing of services in this new and complex area of technology.

Writing for the majority, in *Williams v. Vermont, supra,* 472 U.S. at 28, Justice White noted that: "The 'dominant theme running through all state taxation cases is the concern with the actuality of operation." See also, *Halliburton Oil Well Co. v. Reily*, 373 U.S. 64, at 69 (1963). In *Halliburton*, this Court also

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[10] See, Tenn. Code Ann. § 67-6-102(27) and § 67-7-221, effective June 1, 1989; and Minn. Code Ann. § 297A.25, effective May 31, 1987.

[11] See, for example, Tenn. Code Ann. § 67-6-212, effective May 31, 1987, and Act 22 of 1991, § 43, Pennsylvania General Assembly, effective October 1, 1991.

specifically noted that "equality for purposes of competition and the flow of commerce is measured in dollars and cents, not legal abstractions." 373 U.S. at 70. Wisconsin's Supreme Court, in its *GTE Sprint* case, *supra*, specifically noted that the statutory scheme that imposed Sales Taxes upon an IXC's purchase of access services from an LEC, while not imposing the tax upon the same purchase by resellers or other LECs, resulted in GTE Sprint and all other IXCs being placed at an unfair competitive disadvantage, solely because of the classification made by the Sales Tax statute. The Petitioners here, as subscribers to MTS interstate services, allege that the same situation results from the classification of interstate services made by § 2 of Act 27 of 1987, and that this Court should "level the playing field" by declaring the classification between MTS interstate service and WATS interstate service to be palpably arbitrary, invidious, capricious, feigned and illusory. [12]

c. The Arkansas Supreme Court's decision fails to apply any objective Equal Protection standards mandated by this Court's prior decisions.

In the last decade, the Arkansas Supreme Court has decided three cases involving challenges to state or local taxes based upon the Equal Protection Clause, [13] and that court has denied all of the taxpayers' challenges. In each of these cases, the Arkansas Supreme Court has emphasized it has the duty, under this Court's decision in *Carmichael v. Southern Coal Co., supra,* to "hypothesize" any legitimate basis that the Arkansas General Assembly "could have considered" in making the discriminatory classification

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[12] See the comments of Senator Jon Fitch regarding this competition issue, in the floor debate over S.B. 196 while it was before the Arkansas Senate on January 29, 1987, where he referred to this classification as "horrible." (See, Exhibit B, Petitioners' Motion to Disqualify All Specially Appointed Justices filed on March 29, 1991).

[13] See, *Streight v. Ragland*, 655 S.W.2d 459 (Ark., 1983); *City of Little Rock v. Waters*, 797 S.W.2d 426 (Ark., 1990); and the instant *Bosworth* case.

in its various taxing statutes (810 S.W.2d at 923). The Petitioners respectfully submit that this "hypothesizing" standard adopted by the Arkansas Supreme Court has led it to totally ignore the "objective standards" required in Equal Protection challenge by this Court's prior *Allied Stores of Ohio, supra; Walters v. City of St. Louis, supra;* and *Royster Guano Co., supra; decisions* resulting in this "hypothesizing" activity becoming a "subjective" standard where the challenging taxpayer can never hope to succeed on his burden of proof in an Equal Protection challenge. The taxpayer must not only negate the "purposes" proffered by the state itself, but he must also anticipate any purposes that can be "hypothesized" by the Arkansas court.

Further, the Petitioners submit that an examination of the limited (one page) discussion of the rational basis standards in the Arkansas Supreme Court's decision (810 S.W.2d at 922-923) reflects that that court has failed to properly apply the "two part" rational basis test. Instead, that court has merged both parts into one. The Arkansas court never clearly delineated in its opinion what legitimate "state purpose" was created by the classification in § 2 of Act 27 of 1987. However, it is clear that the second part of the rational basis test was not applied to see if the classification drawn by this statute was "reasonably" or "rationally" related to the state's purpose. The Arkansas court concluded (810 S.W.2d at 923) --

> Once we have reached the conclusion, as we have in this case, that a legitimate governmental purpose could be served by the legislation, and even though we do not know with certainty the actual underlying reasons for the law's enactment, we must bring our analysis to a close.

From a review of the Arkansas Supreme Court's limited analysis of the rational basis test in this case, it appears that that court may have found that the state's purpose for the classification in § 2 of Act 27 of 1987 was to provide a tax incentive to commerce as a means to encourage businesses to stay and locate in this state. (810 S.W.2d at 923) Though the Petitioners acknowledge that the encouragement of business by the creation of tax incen-

tives is a legitimate state purpose for Equal Protection purposes, they steadfastly maintain that the MTS versus WATS classification drawn by § 2 of Act 27 of 1987 is *not* reasonably or rationally related to the purpose of encouraging business. The evidentiary record in this case establishes that there is absolutely no restriction upon either residential or business users subscribing to WATS interstate services. It is also undisputed that the normal telephone regulatory rate structure is generally divided into differential rates for (1) residential subscribers and (2) business subscribers. Thus, if the Arkansas General Assembly had wanted to provide an economic incentive to encourage businesses to stay and locate in this state, it could have drawn the classification by subjecting all *residential* interstate services to the Sales Tax, while excluding or excepting all *business* interstate services from the tax. However, the classification of whether to tax or not to tax interstate telephone services, based solely upon the regulatory rate structure for MTS interstate service, and WATS interstate service, does *not* further the objective of providing tax incentives to encourage businesses to stay or locate in Arkansas, because not *all* businesses are treated or taxed the same. Henningsens, Inc., the small corporate business that is a representative Petitioner herein, and all similarly situated *business* subscribers clearly did not receive any benefit from the classification drawn by § 2 of Act 27 of 1987. The Petitioners submit that all other businesses (no matter of what type or size or the volume of their sales or number of employees), if they have a low volume need for interstate long distance services, they will *not* be treated the same as businesses who are able to economically afford to place their interstate calls through the utilization of untaxed WATS services.

For purposes of testing the constitutionality of the classification created in this case, the Petitioners submit that "telephone service is telephone service is telephone service." Exactly the same transmission equipment is utilized; the same data voice and image messages are transmitted; and the rate structure of both MTS and WATS services are time of day, day of week, length of time utilized, and distance sensitive (with the WATS rates having a lower rate, which amounts to a "volume discount"). The Petitioners submit that the challenged statute's classification based solely upon a utility regulatory rate structure is as irrational,

capricious, palpably arbitrary, and illusory as this Court found the classifications of taxpayers to be in *Zoebel v. Williams*, *supra*, and *Stewart Dry Goods, supra*. This Court has held in *Williams v. Vermont*, 472 U.S. at 27 that "the classification must reflect pre-existing differences; it cannot create new ones that are supported by only their own bootstraps." The Petitioners submit that the WATS versus MTS interstate service classification drawn by § 2 of Act 27 of 1987 is such a "bootstrap" classification, it is not a *real* distinction; and that it does not come within the lack of mathematical precision exception allowed legislatures in creating classifications of taxpayers.

Accordingly, the Petitioners respectfully request that this Court grant their Petition for Writ of Certiorari, and also accept the trial judge's invitation (App. J, *infra*, at 53a) for this Court to reverse her decision upholding the Sales Tax in this case, because a utility regulatory rate structure alone (especially in the circumstances where it creates a competitive pricing advantage for the large "facility based" IXCs) is not a sufficient basis upon which to justify a classification of taxpayers under a proper application of the rational basis test for Equal Protection purposes.

II. THE REFUSAL OF THE SPECIAL ASSOCIATE JUSTICES TO RECUSE, UPON THE REQUEST OF THE PETITIONERS MADE PRIOR TO THE SUBMISSION OF THE CASE, VIOLATED THE PETITIONERS' RIGHTS TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT AND SUCH DECISION CONFLICTS WITH PRIOR DECISIONS OF THIS COURT.

This Court recently ruled in *McKesson Corporation v. Division of Alcoholic Beverages & Tobacco*, 110 S. Ct. 2238, at 2251 (1990) that, in challenges to state taxes, the Due Process Clause of the Fourteenth Amendment requires that the taxpayer be provided with "a fair opportunity to challenge the accuracy and legal validity of their tax obligation [and] ... a "clear and certain remedy" ... for any erroneous or unlawful tax collection to ensure that the opportunity to contest the tax is a meaningful one."

(Citations omitted) It is the "fair opportunity to challenge" issue that is raised by the Petitioners' Due Process claims in this case. Only a decision of this Court, under its general supervisory powers over the states' courts, can grant the Petitioners their Due Process rights here, since there is no other appeal from a refusal by a majority of a state appellate court to recuse at the request of one of the litigants.

This appeal presents an elemental Due Process question that should be held to be well within the limits of Due Process protection under the Fourteenth Amendment. Here, the factual record (upon which the Due Process issue was raised) establishes that: (1) the challenged tax Act was an "administration bill" promulgated by Governor Clinton's administration; (2) the constitutionality of this Act has been defended by a political appointee within Governor Clinton's Executive Department; and (3) the Executive Department stands to lose $5.0 million per year in "new" Sales Tax collections if this case is lost. Thus, Governor Clinton, as the head of Arkansas' Executive Department, is, at the very least, a *de facto* party litigant in this case.

When a majority of the "elected" justices of the Arkansas Supreme Court recused, and rejected the Petitioners' written request for an opportunity to remit (pursuant to the provisions of Canon 3D of the Arkansas Code of Judicial Conduct (App. I, *infra*, 45a), then the appointment provisions of Art. 7, § 9 of the Arkansas Constitution were brought into play, when the Chief Justice of the Court requested Governor Clinton to appoint four special justices to serve in this case. Upon appointment of these special justices, it was ascertained by Petitioners that two of the special "appointed" justices' close family members had recently made substantial political contributions to Governor Clinton (which activity is prohibited by Canon 7A of the Code of Judicial Conduct); that another "appointed" justice had, within the year, been appointed by Governor Clinton in another taxpayer "illegal exaction" case where he had authored the opinion against the taxpayer–class, reversing the trial court's decision; and both Governor Clinton and the Chairman of the ABA Judicial Nominations Committee refused to disclose the standards utilized or contacts made with any lawyers in choosing such special justices.

Based upon these facts, plus the fact that Governor Clinton had unbridled discretion in making his appointments to create a "majority" of the Court that would pass upon the constitutionality of § 2 of Act 27 of 1987, the Petitioners formally filed a Motion Requesting the Recusal and Disqualification of the four special "appointed" associate justices, and suggesting at least four separate methods that could be adopted by either the officials of the Executive or Judicial Departments of Arkansas' state government (as an alternative to Governor Clinton's participating in these appointments), to avoid this constitutional crisis or conflict. This timely objection formally raised the denial of Due Process question, and specifically alleged that this situation (1) raised the appearance of judicial impropriety, (2) questioned the independence of the judiciary, and (3) reasonably raised the question of impartiality; all of which are *requirements* for recusal under the Code of Judicial Conduct. [14]

In the treatise, *Judicial Conduct and Ethics* (The Michie Company, 1990), Professors Shaman, Lubet, and Alfini specifically commented upon this type of situation by stating (p. 100):

> Most judges genuinely believe that, despite their connections to a lawsuit, they can put aside their bias or interest and decide the lawsuits before them in a just and proper way. What this ignores, unfortunately, is that partiality is more likely to affect the unconscious thought processes of a judge than he or she may realize, with the result that the judge has little conscious knowledge of being swayed by improper influences. Further-

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[14] Under the terms of the Code of Judicial Conduct, Canon 1 requires that the judiciary be independent; Canon 2 requires that judges avoid impropriety or even the appearance of impropriety; Canon 3 provides the general rule that a judge should disqualify in any proceeding where his impartiality might reasonably be questioned (an "objective" standard), or the question of impartiality or bias of a judge is raised; Canon 7 prohibits a judge from making political contributions to a candidate; and the compliance provisions (Addendum) state that these requirements of the Code of Judicial Conduct apply to judges *pro tempore*, as well as full time judges.

> more, even if a judge were able to put aside bias and self-interest in a particular case, *the appearance of impropriety remains, and is itself a serious problem that can cast disrepute upon the judiciary*. (Emphasis supplied)

The situation confronting the Petitioners in this case in March of 1991 (because of the recusal of the majority of the "elected" members of the Arkansas Supreme Court) was the same that would have existed if Franklin D. Roosevelt would have had the unbridled discretion and power to appoint the "majority" of this Court to pass upon the constitutionality of his "New Deal" legislation in the 1930's. Since Act 27 of 1987 was undeniably an "administration bill," Governor Clinton simply cannot participate in the appointment process of special justices to participate in this case without raising the *appearance of impropriety*, which situation would disqualify anyone Governor Clinton would appoint.

Though there are four specific factual situations set forth in Canon 3C of the Code of Judicial Conduct, under which judicial officers should recuse and disqualify, the drafters of the Code made it clear that the general rule still had overall control. [15] Under the circumstances of this case, it is inescapable that any *objective* party would find that Governor Clinton's appointed justices' "impartiality" could reasonably be questioned. [16]

This Court has previously rendered decisions in both civil and criminal cases involving Due Process disqualifications of a

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[15] The reporter of the ABA Committee that promulgated the Code of Judicial Conduct, in commenting on Canon 3C, specifically noted that even "the appearance of impropriety in violation of Canon 2...clearly falls within the scope of the general standard." Thode, *Reporters' Notes to Code of Judicial Conduct, American Bar Foundation (1973)*.

[16] Since there are several procedural methods available under state law for the appointment of the four special associate justices in this case, without Governor Clinton being involved, the exception to Canon 3C that applies under the "rule of necessity" is not applicable here. *United States v. Will*, 449 U.S. 200 (1980).

single judge, an entire panel, and a single justice in a multimember panel where that justice provided the swing vote for the majority. [17] The factual situation presented here, where a "majority" of a multimember panel of justices should be disqualified, has never been passed upon by this Court. However, the Petitioners submit that such factual situation is closely analogous to the one that was presented in the *Aetna Life* case, *supra*.

The denial of Due Process rights in a factual instance such as the one presented here is a denial that cannot be defined with precision, but, instead, must be decided on a case by case basis. As this Court succinctly stated in *Matthews v. Eldredge*, 424 U.S. 319, at 334 (1976):

> [D]ue process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstance....Due process is flexible and calls for such procedural projections as the particular situation demands. (Citations omitted)

This Court has accepted and applied this *ad hoc* rule in a case involving a tax challenge, [18] as well as in cases involving requests for judicial recusal. [19]

As Justice Black stated in *In re Murchison*, nearly forty years ago (349 U.S. at 136), the application of "Such a stringent rule may sometimes bar trial by judges who have no actual bias

---

[17] *Tumey v. Ohio*, 273 U.S. 510 (1927); *In re Murchison*, 349 U.S. 133 (1955); and *Ward v. Village of Monroeville*, 409 U.S. 57 (1972); *Gibson v. Berryhill*, 411 U.S. 564 (1973); and *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986).

[18] See, *Davidson v. Court of Administrators of New Orleans*, 96 U.S. 97, 101–102 (1878).

[19] See, *Aetna Life Insurance Company, supra*, 475 U.S. at 822; *Ward, supra*, 409 U.S. at 60; and *In re Murchison, supra*, 349 U.S. at 136.

and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way, justice must satisfy the appearance of justice." *Offitt v. United States*, 348 U.S. 11, 14.

Accordingly, the Petitioners submit that their timely request for disqualification and recusal of the special "appointed" associate justices of the Arkansas Supreme Court, under the factual circumstances presented in this case, properly raised the *objective* claim that their rights to Due Process under the Fourteenth Amendment were being denied. The Arkansas Supreme Court's denial of this request for disqualification, and the authoring of that court's opinion in this case by one of these special "appointed" associate justices (joined by all three of the other special "appointed" justices, a *majority* of the Court), presents a situation where the Petitioners were constitutionally denied their rights to Due Process. Only the granting of this petition and the Court's reversal of the Arkansas Supreme Court's decision, in line with standards set by this Court in its prior decisions, can right the Petitioners' loss of their constitutional rights to enjoy the Due Process of the laws.

CONCLUSION

For the particular reasons stated above, the Petitioners submit that this Petition for Certiorari to the Arkansas Supreme Court should be granted, so as to provide this Court with a vehicle to answer the important Equal Protection and Due Process questions of the Fourteenth Amendment that are presented by the Petitioners.

Respectfully submitted,

SEPTEMBER 27, 1991

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APPENDIX A

Office of the Clerk
Supreme Court of the State of Arkansas
Arkansas Court of Appeals
Justice Building
625 Marshall Street
Little Rock, AR 72201
July 1, 1991

Eugene G. Sayre
Attorney at Law
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Little Rock, AR 72201-3472

Re: 89-345 Hugh H. Bosworth, et. al.
v. James C. Pledger et. al.

Dear Mr. Sayre:

The Supreme Court made the following order in the above styled case today:

"Petition for Rehearing is denied."

Sincerely yours,

LESLIE W. STEEN, CLERK

LWS:rh

cc: Joyce Kinkead
Larry D. Vaught
Frank J. Wills, III
Carol S. Arnold
James N. McCord
(#88-928)
Michael O'Malley
Gregory Hopkins
Charles Schlumberger
Lawrence E. Chisenhall
Alice Holcomb, Clerk

APPENDIX B

SUPREME COURT OF ARKANSAS

No. 89-345

Opinion delivered: June 3, 1991

HUGH H. BOSWORTH, JR., ET. AL.,

Appellants

v.

JAMES C. PLEDGER, COMMISSIONER OF REVENUES, ET. AL.

Appellees

CITY OF FAYETTEVILLE, ARKANSAS, ARKANSAS TELEPHONE ASSOCIATION, INC.

Intervenors

Appeal from Pulaski County Chancery Court, No. 88-928,

Honorable Ellen B. Brantley, Judge

Affirmed

SPECIAL JUSTICE, GEORGIA ELROD

This case involves the constitutionality of the 1987 Arkansas legislative enactment which extended the state sales tax to certain types of long distance telecommunications service while excepting others. In this class action challenge, the appellants, who are telephone subscribers upon whose telephone service the tax was imposed, argued that the tax was unconstitutional, on both

First Amendment and Equal Protection Clause grounds. Appellees represented the state and local governmental agencies responsible for collecting the disputed tax as well as those providers of the long distance service involved, e.g., AT&T Communications, Inc., MCI Telecommunications Corporation, and U.S. Sprint Communications Company. The chancellor held that the law was a valid and legitimate exercise of the state's power to tax and upheld its constitutionality. We affirm.

Prior to the enactment of Section 2 of Act 27 of 1987 [Ark. Code Ann. § 26-52-301(3) (Supp. 1989)], the Arkansas Gross Receipts Tax, or sales tax, was imposed only on *intra*state long distance service. Interstate and international service were not subjected to the tax. In 1987 the law was changed, and the tax was imposed on all long distance telephone service billed to an Arkansas telephone number, excepting from the tax, however, two types of service: (1) private line service which is not accessible by the public, and (2) that service commonly known as WATS service. The relevant portions of section 26-52-301 provide as follows:

> There is levied an excise tax of three percent (3%) upon the gross proceeds or gross receipts derived from all sales to any person of the following:
>
> . . .
>
> (3)(A)(i) Service by telephone, telecommunications, and telegraph companies to subscribers or users, including transmission of messages or images, whether local or long distance.
>
> (ii) Taxable services shall include basic local service and rental charges, including all

installation and construction charges and all service and rental charges having any connection with transmission of any message or image.

(iii) Except as provided in subdivision (3)(iv) of this section, taxable long distance services shall include:

(a) Long distance messages which originate and terminate within this state:

(b) Interstate long distance messages which originate within this state and terminate outside this state and are billed to an Arkansas telephone number or customer location;

(c) Interstate long distance messages which originate outside of this state and terminate within this state and are billed to an Arkansas telephone number or customer location.

(iv) However, the following services shall not be subject to the tax:

(a) Any interstate private communications service which is not accessible by the public;

(b) Any interstate service which allows access to private telephone lines and which is not accessible by the public; or

(c) Any interstate-wide area telecommunications service or other similar service which entitles the subscriber to make or receive an unlimited number of communications to or from

> persons having telecommunications service in a specified area which is outside the state in which the station provided with this service is located.
>
> (v) This tax shall apply to all customer access line charges billed to an Arkansas telephone number. Access line charges are those charges associated with or for access to the long distance network. However, access or other telecommunication services provided to telephone, telegraph, or telecommunications companies which will be used to provide telecommunications services shall not be subject to this tax.

Appellants do not challenge the exception for private line service, contending only that the tax was improperly imposed on, and thus discriminated against, Arkansas subscribers to long distance telephone service not of the WATS variety.

Although the record below contains much evidence on the complex aspects of telecommunications technology and rate structure, the chancellor found that the differences between the two types of service, one taxed and the other not, could be described as follows:

(1) "Regular" long distance service (sometimes called MTS service) is billed on a per call basis with the charge for each call generally depending on the day of the week and the time of the day at which the call is made, the geographic distance of the call, and the temporal length of the call. This is the most common type of long distance service and is usually subscribed to by those who may, in addition, use WATS service. This service is subjected to the sales tax.

(2) Wide-area telecommunications service, commonly known as WATS, is where the subscriber is charged a

flat fee for the service, receiving then a lower rate for each call made or received. This category is broken down between incoming WATS, or "800 service," and outgoing WATS. This service is not subjected to the tax.

The chancellor also found that "[t]he main difference between WATS and MTS is in rate design," and that both services are available to any customer, with no eligibility requirements. Appellants, plaintiffs below, all subscribe to "regular" long distance service and none to WATS service. All parties generally agreed that a customer must have a high volume of telephone usage in order to justify economically the use of WATS.

Appellants' constitutional challenge to Section 2 of Act 27 of 1987 is based upon the state's purported violation of the equal protection provisions of both the Arkansas [1] and U.S. [2] Constitutions. Their argument, made in the trial court, that the statute violated the Commerce Clause of the U.S. Constitution, was definitively decided against them during the course of this litigation by the U.S. Supreme Court in *Goldberg v. Sweet*, ___ U.S. ___, 109 S. Ct. 582 (1989) and was not argued on appeal. Appellants' argument that their due process rights under the U.S. and Arkansas Constitutions were violated because the statute was unclear, or void for vagueness, was not properly presented at the trial court level, nor addressed by the chancellor in her findings of fact and conclusions of law. Likewise, the chancellor did not address appellants' point, argued on appeal, that the statute was ambiguous. Thus, neither of these latter issues will be addressed by this court. *Shamlin v. Shuffield*, 302 Ark. 164, 787 S.W.2d 687 (1990).

---

[1] Ark. Const. art. 2, § § 3 and 18.

[2] U.S. Const. amend. 14.

We are called upon to answer three questions in resolving the constitutional issues presented by this case: (1) Does the imposition of the tax discriminate against or among individuals? (2) If so, what standard is to be applied in testing the legitimacy of the law, a "rational basis" standard or one which requires the showing of a compelling state interest? (3) And, finally, does the statute meet the requisite standard? These questions will be addressed in turn.

I.

In deciding whether an equal protection challenge is warranted, there must first be a determination that there is a state action which differentiates among individuals. "no state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. 14. Appellees argue that the threshold element of classification of individuals is not met because the only distinction made by the statute is between services, not people. Appellees cite *Potts v. McCastlain*, 240 Ark. 654, 401 S.W.2d 220 (1966), *cert. denied*, 358 U.S. 946 (1967), where this court upheld a privilege tax imposed on taxicabs but not on other vehicles using the same streets. They argue that as long as all "regular" long distance subscribers are taxed the same, just as all taxicab operators were taxed the same, there is no differentiation among individuals, all being treated equal. In addition, appellees cite the chancellor's finding that "all three types of service -- MTS, private line, and WATS -- are available to any customer; there are no eligibility requirements," to bolster their argument that this is a tax imposed on services, not individuals.

Although it is true that the tax is imposed on one type of long distance service and not another, it is also true that taxes are paid by individuals, and the record reflects that subscribers to "regular" long distance service pay the tax, while subscribers to WATS service do not. This disparate treatment under the statute of classes of individuals is sufficient to raise the equal protection challenge and require our further analysis.

II

Once equal protection is invoked, we must then decide what standard of analysis applies. In other words, we must determine whether it is necessary only to show some rational basis for the classification, or whether the statute impinges on a fundamental right or is based on a suspect criterion, in which case the state is required to prove not only that the statute is reasonable but also that it promotes a compelling state interest. Appellants argue for the application of the stricter standard because their constitutional rights of free speech are imperiled; appellees contend reasonableness alone is required.

The U.S. Supreme Court recognized the broad discretion legislatures have in formulating tax policy in *Madden v. Kentucky*, 309 U.S. 83, 87–88 (1940):

> The broad discretion as to classification possessed by a legislature in the field of taxation has long been recognized ... [T]he passage of time has only served to underscore the wisdom of that recognition of the large area of discretion which is needed by a legislature in formulating sound tax policies. Traditionally classification has been a device for fitting tax programs to local needs and usages in order to achieve an equitable distribution of the tax burden. It has, because of this, been pointed out that in taxation, even more than in other fields, legislatures possess the greatest freedom in classification. Since the members of a legislature necessarily enjoy a familiarity with local conditions which this Court cannot have, the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes.

In *Streight v. Ragland*, 380 Ark. 206, 655 S.W.2d 459 (1983), this court considered an equal protection challenge to a state income tax law which provided an exemption on retirement income from certain government sources but denied the exemption to private retirement income. In upholding the exemptions as valid exercises of the state's taxation powers, we stated:

> The rational basis test has long been applied by the Supreme Court in reviewing state legislation under the equal protection clause of the 14th Amendment which imposed special burdens or granted exemptions from such burdens through classification schemes ...
>
> Under the rationality standard of review, we must presume the legislation is constitutional, i.e. that it is rationally related to achieving a legitimate governmental objective.

Id. at 212–13, 655 S.W.2d at 463.

While acknowledging the applicability of the rational basis analysis to a state's taxation powers, appellants argue that in this case the court should apply a higher standard because their First Amendment protections under the U.S. Constitution have been abridged. Appellants assert that they have a "fundamental right" to exercise "free speech" by transmissions over the telephone, and because these rights are implicated in the tax-based classification between long distance subscribers, the state must show that it has a compelling state interest to justify the infringement. In support, appellants cite *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenues*, 460 U.S. 575 (1983); *Arkansas Writers' Project, Inc. v. Ragland*, 287 Ark. 155, 697 S.W.2d 94 (1985), *reh'g denied*, 287 Ark. 155, 698 S.W.2d 802 (1985), rev'd, 481 U.S. 221 (1987); and *Medlock v. Pledger*, 301 Ark. 483, 785 S.W.2d 202 (1990), *rev'd sub nom. Medlock v. Leathers*, ___ U.S.

___, 111 S. Ct. 1438 (1991).

Minneapolis Star, supra, involved a special use tax on the cost of paper and ink consumed in the production of publications, exempting the first $100,000 used, with the result that only a few of the largest publishers were taxed. The Court invalidated the tax, citing First Amendment infringement with no compelling state interest to redeem it. *Arkansas Writers' Project, supra*, invalidated an Arkansas law which taxed general interest magazines but exempted from the sale tax, sales of religious, professional, trade and sports magazines.

Both *Minneapolis Star* and *Arkansas Writers' Project* are distinguishable from the present case, as both of those cases involved a form of censorship of the speaker, i.e., the largest newspapers, and in *Arkansas Writers' Project* there was censorship of the content, i.e., that contained in general interest magazines. In the present case there is no attempt to censor based on content or to discriminate among classes of speakers. Act 27 imposes a tax on every use of the types of long distance services that are subject to the tax, regardless of the purpose for which the customer uses the service, what the customer says while using the service, or the identity of the service provider.

The case most closely on point, and to this court determinative of the First Amendment question, is *Medlock, supra,* where the constitutional validity of a sales tax on cable television service was challenged. The tax was levied on cable television service, but not on similar services, such as satellite television programming. Although this court determined the tax unconstitutional because of First Amendment infringement, the U.S. Supreme Court saw otherwise and held that the law in question did not threaten to suppress the expression of particular ideas or viewpoints, nor did it target a small group of speakers or discriminate on the basis of the content of taxpayers' speech. None of these three elements being present, the tax was not constitutionally

vulnerable on First Amendment grounds.

> The Arkansas Legislature has chosen simply to exclude or exempt certain media from a generally applicable tax. Nothing about that choice has ever suggested an interest in censoring the expressive activities of cable television. Nor does anything in this record indicate that Arkansas' broad-based, content-neutral sales tax is likely to stifle the free exchange of ideas. We conclude that the State's extension of its generally applicable sales tax to cable television services alone, or to cable and satellite services, while exempting the print media, does not violate the First Amendment.

Medlock v. Leathers, ___ U.S. at ___, 111 S. Ct. at 1447.

We therefore hold that Act 27 of 1987 does not violate appellants' First Amendment rights, and the stricter standard of review is inapplicable. The appropriate analysis, therefore, is whether there exists for the classification any rational basis which provides a "deliberate nexus with state objectives so that the legislation is not the product of utterly arbitrary and capricious government and void of any hint of deliberate and lawful purpose." *Streight v. Ragland*, 280 Ark. 206, 215, 655 S.W.2d 459, 464 (1983).

III

The burden is upon appellants to demonstrate the lack of rational basis for the tax. *Streight, supra*. The legislature has the discretion, within reasonable limits, to determine the scope of the exercise of its taxing power, and there is a presumption in favor of the validity of its action. *Potts v. McCastlain*, 240 Ark. 654, 401 S.W.2d 220 (1966), *cert. denied*, 358 U.S. 946 (1967).

A state has wide latitude in the exercise of its power of taxation. The power to tax necessarily implies the power to discriminate in taxation. The law does not dictate that taxing measures be applied to all members of a class or none. Distinctions are permissible, and if there is any conceivable set of facts to uphold the law's rational basis, it will be upheld. *Carmichael v. Southern Coal Co.*, 301 U.S. 495 (1937); *Dicks v. Naff*, 355 Ark. 357, 500 S.W.2d 350 (1973).

In determining whether a rational basis for the legislation exists, we are not required to discover the *actual* basis for its enactment, but rather we are allowed to hypothesize the facts giving rise to the classification.

Testimony in the trial court indicated that WATS or WATS-like service tended to be used by large volume consumers of telephone service. It is not economically feasible to purchase WATS service unless the consumer has a large volume of long distance telephone usage; thus the WATS customer is more likely to be a business subscriber than to be an individual residential subscriber.

The State of Arkansas has a long history of providing tax incentives to commerce as a means to encourage businesses to stay and locate in this state, and, certainly, economic development is a legitimate and worthy governmental goal. For example, the "enterprise zone" legislation gives a tax advantage to industries that locate in economically depressed areas, Ark. Code Ann. § 15-4-807 (Supp. 1989), and the motion picture industry is accorded tax incentives in order to encourage film making in this state. Ark. Code Ann. § 26-4-206 (1987), and § 26-52-402(c)(3) (1987).

The legislature may have intended, in the enactment of Section 2 of Act 27 of 1987, to encourage large volume users of telephone service, i.e., WATS subscribers, to remain or relocate in Arkansas. We agree with the chancellor's finding that this basis

for the legislation would be rationally related to achieving a legitimate governmental objective.

It is not the job of this court to evaluate the wisdom of our legislature in enacting tax measures, which inevitably will fall more heavily on some than on others. Our task is to protect against classifications which are arbitrary and without reason. As the United States Supreme Court stated in *City of New Orleans v. Dukes*, 427 U.S. 297, 303–304 (1976):

> States are accorded wide latitude in the regulation of their local economies under their police powers, and rational distinctions may be made with substantially less than mathematical exactitude .... [T]he judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines, ... in the local economic sphere, it is only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment.

Once we have reached the conclusion, as we have in this case, that a legitimate governmental purpose could be served by the legislation, and even though we do not know with certainty the actual underlying reasons for the law's enactment, we must bring our analysis to a close. We therefore confirm the constitutionality of the law and affirm the chancellor's decision.

Affirmed.

Special Justices John R. Byrd, James H. Pilkinton, Jr., and David M. Glover join in this opinion.

Dudley, Hays, Newbern, and Glaze, JJ., not participating.

APPENDIX C

Office of the Clerk
Supreme Court of The State of Arkansas
Arkansas Court of Appeals
Justice Building
625 Marshall Street
Little Rock, AR 72201
December 10, 1990

Eugene G. Sayre
Attorney at Law
425 W. Capitol Avenue
3400 TCBY Tower
Little Rock, AR 72201

Re: 89-345 Hugh H. Bosworth, et al.
v. James C. Pledger et al.

Dear Mr. Sayre:

The Supreme Court made the following order in the above styled case today:

"Appellants' motion for reconsideration of recusal or disqualification of justices is denied."

Sincerely,

LWS:rh

LESLIE W. STEEN, CLERK

cc: Amy Stewart
Carol S. Arnold
Joseph Morphew
Lawrence R. Chisenhall
James N. McCord
Scotty Shively
W.W. Elrod, II
Frank J. Wills III
Rick L. Pruett
Gregory Hopkins
Pat Moran
N. M. Norton
Larry D. Vaught

APPENDIX D

Office of the Clerk
Supreme Court of The State of Arkansas
Arkansas Court of Appeals
Justice Building
625 Marshall Street
Little Rock, AR 72201

April 15, 1991

Eugene G. Sayre
Attorney at Law
425 W. Capitol Avenue
3400 TCBY Tower
Little Rock, AR 72201

Re: 89-345 Hugh H. Bosworth, et al.
v. James C. Pledger et al.

Dear Mr. Sayre:

The Supreme Court made the following orders in the above styled case today:

> "Appellants' motion and affidavit requesting this court to take judicial notice of the filing of briefs by U.S. Sprint Communications with the Supreme Court of Wisconsin is denied. Appellants' motion suggesting disqualification of all appointed "special" associates justices, for reconsideration of recusal or disqualification by elected justices, or,

alternatively, for other relief is denied. Dudley, Hays, Newbern, and Glaze, JJ., not participating."

Sincerely,

LESLIE W. STEEN, CLERK

LWS:rh

cc: Larry D. Vaught
N.M. Norton, Jr.
Amy Stewart
Carol S. Arnold
Pat Moran
Craig Smith
Rick L. Pruett
James M. McCord

APPENDIX E

IN THE CHANCERY COURT OF
PULASKI COUNTY, ARKANSAS
FIFTH DIVISION

HUGH H. BOSWORTH, JR., ET. AL.

v. NO. 88-928

JAMES C. PLEDGER, Commissioner of Revenues; ET AL.

(Filed May 19, 1989)

FINDINGS OF FACT, CONCLUSIONS OF LAW, ORDER AND JUDGMENT

This action was commenced by plaintiffs as a class action on March 3, 1988, challenging the constitutionality of Act 27 of 1987, codified at Ark. Code Ann. § 26-52-301(3)(A), which imposes the Arkansas Gross Receipts Tax (hereinafter, "the Sales Tax") on telephone, telegraph telecommunication services. The statute states as follows:

> There is levied an excise tax of three percent (3%) upon the gross proceeds or gross receipts derived from all sales to any person of the following:
>
> * * *
>
> (3)(A)(i) Service by telephone, telecommunications, and telegraph companies to subscribers or users, including transmission of messages or images, whether local or long distance.

(ii) Taxable services shall include basic local service and rental charges, including all installation and construction charges and all service and rental charges having any connection with transmission of any message or image.

(iii) Except as provided in subdivision (3)(iv) of this section, taxable long distance services shall include:

(a) Long distance messages which originate and terminate within this state;

(b) Interstate long distance messages which originate within this state and terminate outside this state and are billed to an Arkansas telephone number or customer location;

(c) Interstate long distance messages which originate outside of this state and terminate within this state and are billed to an Arkansas telephone number or customer location.

(iv) However, the following services shall not be subject to the tax:

(a) Any interstate private communications service which is not accessible by the public;

(b) Any interstate service which allows access to private telephone lines and which is not accessible by the public; or

> (c) Any interstate wide-area telecommunications service or other similar service which entitles the subscriber to make or receive an unlimited number of communications to or from persons having telecommunication service in a specified area which is outside the state in which the station provided with this service is located.
>
> (v) This tax shall apply to all customer access line charges billed to an Arkansas telephone number. Access line charges are those charges associated with or for access to the long distance network. However, access or other telecommunication services provided to telephone, telegraph, or telecommunications companies which will be used to provide telecommunications services shall not be subject to this tax.

Plaintiffs' challenge focuses on the provisions of Act 27 governing imposition of the tax on interstate long-distance services (Ark. Code Ann. § 26-52-301(3)(A)(iii)(b) through (3)(A)(v)). In this regard, they challenge Act 27 primarily on two grounds. First, they contend that the Act violates the equal protection clauses of the state and federal constitutions [1] due to the statute's exemption from taxation of certain types of interstate long-distance telecommunications. Second, they argue that the imposition of the Sales Tax on interstate long-distance telecommunications violates the commerce clause of the federal constitution. [2] The plaintiff class consists of those individuals and entities that subscribe to those types of interstate long-distance telecommunication services that are taxed.

---

1 Ark. Const., art. 2, sec. 3; U.S. Const. amend. 14.

2 U.S. Const. art. 1, sec. 8, cl. 3.

The defendants in this action fall into two categories. The first consists of the state and local governmental officials and entities that levy the Sales Tax ("the Taxing Authorities"). The second category consists of the providers of interstate long-distance services, here collectively referred to as the inter-exchange carriers ("IXCs"). The IXCs are the entities that are required by law to collect and remit the Sales Tax to the Taxing Authorities.

A trial and hearing on the merits of this action was held on December 13, 1988. Previously, there had been substantial briefing of the issues in this case, as well as hearings at which evidence was introduced. The following findings of fat and conclusions of law are based on the entire record in this case, including all evidence introduced throughout the course of these proceedings.

FINDINGS OF FACT

1. Act 27 of 1987, Ark. Code Ann. § 26-52-301(3)(A), was passed by the General Assembly of the State of Arkansas on February 9, 1987, and was approved by the Governor on February 11, 1987. As stated in its emergency clause, Act 27 became effective immediately upon passage and approval.

2. In the context of Act 27, interstate long-distance services are divided into three types. The first type is "regular" long-distance service, hereafter referred to as MTS. MTS is billed on a per-call basis, with the charge for each call generally depending on the day of the week and the time of day at which the call is made, the geographic distance of the call, the temporal length of the call. MTS is provided by all IXCs, and this is the type of long-distance service most commonly subscribed to by the IXCs' customers. All of the representative plaintiffs in this action subscribe to MTS.

3. The second type of interstate long-distance service is Private Line service. This type of service provides a direct, discrete line between or among points designated by the customer. Private Line Service is accessible only by the points that are part of the Private Line network, and Private Line service cannot be used to access other points outside the network. None of the plaintiff-representatives subscribe to Private Line service.

4. The third type of interstate long-distance service is wide-area telecommunications service, commonly known as WATS. This type of service may be provided over either dedicated or non-dedicated lines and contains two sub-categories: Incoming WATS, sometimes known as "800 service," and outgoing WATS. The main difference between WATS and MTS is in rate design. Instead of incurring charges on a per-call, per-minute basis, the WATS subscriber is charged a flat rate for the service. In effect, WATS is a "bulk" service. None of the plaintiff-representatives subscribe to WATS service.

5. Under Act 27, interstate long-distance telecommunications made through MTS service are subject to the Sales Tax, while interstate long-distance telecommunications made through Private Line and WATS services are not subject to the Sales Tax.

6. Generally, subscribers to Private Line or WATS service also are subscribers to MTS service.

7. All three types of services -- MTS, Private Line, and WATS -- are available to any customer; there are no eligibility requirements.

8. An "access" charge is a charge levied by the local telephone service providers (local exchange carriers or "LECs") at the originating and terminating points of a long-distance telecommunication. Generally, a long-distance telecommunication originates on the system of an LEC and then is "switched" from

the originating LEC's system to the IXC's system, which transmits the message to the locale of the terminating point. When the message reaches the terminating locale, it is then "switched" into the system of the LEC for that locale for final transmission to the terminating point. The access charge thus is the charge levied by the LECs for accessing their systems as part of the long-distance telecommunication.

CONCLUSIONS OF LAW

I. Equal Protection

9. To prevail on their claim that Act 27 violates the equal protection clauses of the state and federal constitutions, plaintiffs first must establish the threshold elements of such a claim: A state action that creates classes of individuals upon which disparate treatment is imposed. Then, plaintiffs must establish that the disparate treatment imposed by the state action is without rational basis; i.e., that the state action is not rationally related to a legitimate state purpose. *E.g., Streight v. Ragland*, 280 Ark. 206, 213, 655 S.W.2d 459, 463 (1983).

10. Plaintiffs' equal protection challenge fails, in the first instance, because the threshold elements are not present in this case. Unquestionably, Act 27 constitutes a state action. Act 27 also crates class differentiation in that some types of interstate long-distance services are taxed, while others are not. But the critical distinction here is that the class differentiation focuses upon types of *services*, not individuals. Every individual that subscribes to MTS is taxed for the use of that service. The fact that subscribers to Private Line and WATS services are not taxed has nothing to do with those individuals' identifies; rather, by the terms of Act 27 the distinguishing characteristic is the type of service provided. This critical distinction under equal protection analysis is established in both and federal and state law. In *Reeder v. Kansas City Board of Police Commissioners*, 796 F.2d 1050 (8th

Cir. 1986), the Eighth Circuit upheld a Missouri statute prohibiting Kansas City policy officers (and *only* Kansas City police officers) from participating in or contributing to political causes and campaigns. In upholding the statute, the Eighth Circuit ruled that the equal protection clause protects people, not places:

> So long as all persons within the jurisdictional reach of the statute are equally affected by the law, it matters not that those outside the territorial reach of the law are free to behave differently.

796 F.2d at 1053. More directly on point is *Potts v. McCastlain*, 240 Ark. 654, 655, 401 S.W.2d 220, 221–22 (1966), *cert. denied*, 358 U.S. 946, 87 S. Ct. 319 (1966). In that case, the Arkansas Supreme Court upheld a privilege tax on taxicabs (and *only* taxicabs), ruling that the equal protection clause only requires the tax to be collected impartially from all similarly situated *persons*. Thus, since all taxicab operators were subject to the tax, they were treated the same, and thus the threshold element of disparate treatment among individuals was lacking.

11. Plaintiffs attempt to meet this threshold element by asserting that, in application, ct 27 discriminates among individuals. Specifically, plaintiffs assert that the taxed services (MTS) traditionally are used by "small" consumers of long-distance telecommunication service, while the non-taxed services (Private Line and WATS) traditionally are used by "large" consumers, such as businesses. Plaintiffs offered no demographic or statistical evidence to support this contention, but even assuming that it is true, one established fact rebuts this argument: *All* types of services, both taxed and non-taxed, are available to *all* customers if they choose to subscribe to them. Granted, it would seem that the decision whether to subscribe to a Private Line or WATS service would be driven by economic considerations. Why, for example, would the traditional residential user subscribe to these presumably more costly types of service? To answer this question,

the Court would be substituting its own, particular judgment of what is rational and what is irrational for the judgment of the residential user, who best knows his or her own situation. Rationality is, after all, a relative concept. A decision that appears ridiculous to one may make absolute sense to another. Courts as factfinders can only find fact, and the fact here is that all services are available to all customers. If the non-taxed services actually were restricted in availability to certain classes of customers, then plaintiffs would establish the threshold element. However, this simply is not the case.

12. Furthermore, assuming *arguendo* that plaintiffs could meet the threshold elements of an equal protection challenge through their classifications of "small" and "large" consumers of long-distance telecommunication services, nonetheless plaintiffs' equal protection challenge fails on the merits. In attacking a state action on equal protection grounds, and where, as here, the "rational basis" standard is applicable, plaintiffs bear the heavy burden of overcoming the presumption of Act 27's validity as being rationally related to a legitimate state purpose. [3] *Streight*,

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[3] Of course, if the disparate treatment infringes upon a so-called "fundamental right," then the burden shifts to the state to establish a "compelling state interest" for the disparate treatment. Earlier in these proceedings, plaintiffs attempted to invoke this higher standard by positing that the tax infringes on their right to free speech, guaranteed under the first amendment of the federal constitution. Plaintiffs' First Amended Complaint, ¶23(b). It appears that plaintiffs abandoned this particular argument, since it is not addressed in their trial brief, which addresses their equal protection claim only from the standpoint of "rational basis" analysis. However, even if plaintiffs did not intend to waive their "fundamental interest" argument, nonetheless it is untenable. Again assuming *arguendo* that plaintiffs meet the threshold elements of an equal protection challenge, the "fundamental interest" of free speech is not implicated in this case. In the first place, freedom of speech is not absolute; it is a relative right that may be modified or regulated in the interplay with the constitutional rights of others. *American Communications Association v. Douds*, 339 U.S. 382, 70 S. Ct. 674 (1950). In this regard, it is unquestionable that the State has the constitutional right to impose taxes. In this case, the tax is imposed on certain types of long-

280 Ark. 206, 213, 655 S.W.2d 459, 463 (1983). In addressing this issue, the Court is constrained to recognize that a state's power of taxation is broad, particularly with respect to differentiation among the subjects of taxation:

> A legislature is not bound to tax every member of a class or none. It may make distinctions of degree having a rational basis, and when subjected to judicial scrutiny they must be presumed to rest on that basis if there is any conceivable state of facts which would support it.

Carmichael v. Southern Coal Co., 301 U.S. 495, 509 (1937), *quoted in Dicks v. Naff*, 255 Ark. 357, 359, 500 S.W.2d 350, 353 (1973).

13. The Arkansas Supreme Court applied precisely this test in the relatively recent *Streight* decision, where it upheld a state statute exempting from income taxation certain retirement income of state and federal public employees, over the challenge that the statute violated equal protection by according disparate treatment to those receiving private retirement benefits. In articulating the rational basis standard, the Court essentially paraphrased the burden-of-proof language quoted from *Carmichael*, above, and specifically noted that under this standard the judiciary may hypothesize freely to determine a conceivable basis for the differentiation. 280 Ark. at 213-14, 655 S.W.2d at 464. The Court then proceeded with such hypothetical analysis,

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distance telecommunication *services*. The tax is imposed on those types of services regardless of the *content* of the message, or *by whom* the message is transmitted. These are the elements that must be present in order to mount a successful claim that a state action infringes or free speech. *Arkansas Writers' Project, Inc. v. Ragland*, ___ U.S. ___, 107 S. Ct. 1722, 1727 (1987) (content); *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 103 S. Ct. 1365 (1983) (identity). These elements simply are not present in this case.

reasoning that the legislature may have determined that the exemption was needed to lure retirees to Arkansas, and that the exemption may have been narrowly drawn to exclude other types of retirees because those other types of retirees are not as well organized a public service retirees, and hence the "lure" would be ineffective as to them. 280 Ark. 214–15, 655 S.W.2d at 464.

14. Applying this same hypothetical analysis, and using the very "small–large" differentiation upon which plaintiffs base their equal protection claim, it is not at all difficult to imagine the type of "rational basis" that would pass constitutional muster. If, as plaintiffs assert, the non–taxed services accord an advantage to "large" consumers of long–distance telecommunication service, such as businesses and industry, then the legislature may have intended this in order to provide an incentive to keep existing businesses and industries here, as well as attracting new ones. Businesses that use WATS service to contact and be contacted by their interstate customers thus would benefit from the exemption, as would businesses that employ Private Line service to inter–connect out–of–state offices and computer equipment.

15. Using tax breaks as a means of achieving this end certainly is not a new or revolutionary device. As early as 1925, the legislature proposed and the voters approved a constitutional amendment providing a seven–year tax exemption for new textile mills established in the state. Ark. Const. Amend. 12. This amendment is still on the books. More recently, in 1983 the legislature passed and the governor approved so–called "enterprise zone" legislation to give tax breaks to industries that locate in economically depressed areas. Ark. Code Ann. § 15–4–807. Also, the motion picture industry enjoys a sales tax exemption to promote movie–making in this state. Ark. Code Ann. § 26–52–402(c)(3). Finally, the steel industry is encouraged through tax benefits provided for the construction of steel mills in Arkansas. Ark. Code Ann. § § 15–4–1101 *et seq.*

16. Thus, taking plaintiffs' "small-large" customer classification in the light most favorable to them, nonetheless they have failed to demonstrate that the exemptions accorded the types of interstate long-distance services, which presumably benefit only "large" customers, are without a rational basis. Accordingly, their equal protection challenge fails.

II. Commerce Clause

17. Plaintiffs' second claim that Act 27 violates the commerce clause of the United States Constitution is governed by the United States Supreme Court's recent decision in *Goldberg v. Sweet*, 57 U.S.L.W. 4070 (Jan. 10, 1989), where that Court upheld a virtually identical tax levied by Illinois, [4] applying the four-part test articulated in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 97 S. Ct. 1076 (1977). That four-prong test contains the following elements:

(a) Whether the taxed activity is sufficiently connected to the state;

(b) Whether the tax is fairly apportioned to local activities within the state;

(c) Whether the tax discriminates against interstate commerce; and

(d) Whether the tax is fairly related to benefits provided to the taxed entity.

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[4] The Illinois statute at issue in *Goldberg* imposes a tax on the gross charge of interstate telecommunications that (1) originate or terminate within Illinois and (2) are charged to an Illinois service address, regardless of where the call is billed or paid. 57 U.S.L.W. at 4071.

430 U.S. at 280–87, 97 S. Ct. at 1079–83. *Goldberg*, 57 U.S.L.W. at 4071.

18. At the outset, the Court recognizes that interstate long–distance telecommunications are in interstate commerce, thus making scrutiny under the *Complete Auto* test appropriate. *See Goldberg*, 57 U.S.L.W. at 4072.

19. The first prong of the *Complete Auto* test holds that the taxed activity must be sufficiently connected to the state. This prong is commonly referred to as the "nexus" test. Act 27 imposes the Sales Tax on interstate long–distance telecommunications that (1) originate within this state, terminate outside this state, and are billed to an Arkansas telephone number or customer location, and (2) originate outside Arkansas, terminate within Arkansas, and are billed to Arkansas telephone numbers or customer locations. Ark. Code Ann. § 26–52–301(3)(A)(iii)(b), (c). Thus, the tax here is essentially identical to the Illinois tax at issue in *Goldberg*. *See*, n.4, *supra*. In *Goldberg*, the parties agreed that Illinois had a substantial nexus with the interstate telecommunications reached by the state's tax. 57 U.S.L.W. at 4072. Plaintiffs here offer no such concession, but there can be little doubt that Arkansas has a sufficient connection both to the taxable event and to the service location. In *Goldberg v. Johnson*, 117 Ill.2d 493, 512 N.E.2d 1262 (Ill. 1987), the decision ultimately affirmed by the United States Supreme Court, the Illinois Supreme Court ruled that the taxed activity had a substantial nexus to the state, thus meeting the first prong of *Complete Auto*. Since the structure of Act 27 is the same as that of the Illinois tax, it suffices to paraphrase the Illinois Supreme Court on the "nexus" issue:

> Not only does the taxable event transpire in [Arkansas] but the "gross charge" for the taxable event must be paid for in [Arkansas] or billed to an address in [Arkansas]. Consequently, [Arkansas] is exacting a tax only on those

> interstate communications which touch the State and which are actually paid for in [Arkansas] or are billed to service addresses located in [Arkansas].

512 N.E.2d at 1266. Accordingly, the Sales Tax here meets the first prong of *Complete Auto*.

20. The second prong of the *Complete Auto* test is whether the tax is fairly apportioned to cover those aspects of the service that are associated with the State. On this issue, plaintiffs point specifically to the provision of Act 27 that subjects to the tax "all customer access line charges billed to an Arkansas telephone number." Ark. Code Ann. § 26-52-301(3)(A)(v). Plaintiffs argue that, to the extent this provision applies to any access charge imposed by the out-of-state LEC, Act 27 does not meet the second prong of the test.

21. The Illinois tax at issue in *Goldberg* also applied to access charges levied by out-of-state LEC's. In upholding the tax on the apportionment issue, the Supreme Court, nothing that there is no single, constitutionally mandated apportionment formula, analyzed the tax to assure that it is externally and internally consistent. 57 U.S.L.W. at 4072.

22. Internal consistency requires that the tax be structured so that if every state were to impose an identical tax, no multiple taxation would result. *Id.* In *Goldberg*, the Supreme Court concluded that --

> the Tax Act is internally consistent, for if every State taxed only those interstate phone calls which are charged to an in-state service address, only one State would tax each interstate telephone call.

Id. Turning to Act 27, it is clear that the same conclusion must

follow. By its terms, the tax on interstate telecommunications is limited to those billed to "an Arkansas telephone number or customer location." Ark. Code Ann. § 26-52-301(3)(A)(iii)(b), (c). Accordingly, applying *Goldberg*, the tax is fairly apportioned and Act 27 is internally consistent.

23. Likewise, Act 27 is externally consistent. External consistency turns on whether the State is taxing only that portion of the revenues from the interstate activity which reasonably reflects the in-state component of the activity being taxed." *Goldberg*, 57 U.S.L.W. at 4072. In *Goldberg*, the appellants contended that a tax on the entire gross charge of an interstate activity *a fortiori* does not reflect in-state business activity and thus is unapportioned. *Id.* But the appellee argued, and the Supreme Court agreed, that the tax was for all intents and purposes a sales tax, "assessed on the individual consumer, collected by the retailer, and accompanies the retail purchase of an interstate telephone call." *Id.* at 4072-73. Thus, the Court concluded, "Even though such a retail purchase is not a purely local event since it triggers simultaneous activity in several States, . . . the Tax Act reasonably reflects the way that consumers purchase interstate calls." *Id.* at 4073 (citations omitted)

24. Additionally, the Court rejected the notion that inter-state calls are exposed to taxation by other states. The Court stated, first, that neither a state through which a call passes nor a state at which a call terminates has a substantial nexus for that state to tax the call. *Id.* Second, the Court stated that only two states have a substantial nexus for taxing purposes: a state like Illinois that taxes the origination or termination of a call that is charged to a service address in Illinois, and a state *like Arkansas* that taxes the same types of calls that are billed or paid within Arkansas. *Id.*, citing Ark. Code Ann. § 26-52-301(3). While the Court recognized a small risk of multiple taxation as between these two types of states (57 U.S.L.W. at 4073, n. 13), the risk is so limited that it would not work to invalidate the tax scheme. Id.

Moreover, the Court recognized that the Illinois tax statute contained a specific credit provision that avoids this limited risk. *Id.*

25. In concluding that the Illinois tax met the external consistency test, the Court also rejected apportionment on a mileage or geographic basis. Contrasting the various transportation tax cases, which dealt with "the movement of large physical objects over identifiable routes, where it was practicable to keep track of the distance actually traveled within the taxing State," the Court reasoned that apportionment based on mileage or geography of individual telephone calls would produce "insurmountable administrative and technological barriers, due to the intangible nature of the movement of telephone calls through commerce. *Id.* The Court concluded that the Illinois tax was "a realistic legislative solution to the technology of the present-day telecommunications industry." *Id.*

26. Counseled by the Supreme Court's rationale in *Goldberg*, this Court perceives no distinguishing characteristic on the external consistency issue that would lead to a different result here. Act 27 *is* a sales tax and "reasonably reflects the way that consumers purchase interstate calls." *Goldberg*, 57 U.S.L.W. at 4073. Furthermore, since the Supreme Court itself blessed the Arkansas tax as one that falls within the contours of the nexus test, in the context of external consistency, this Court would be hard pressed to find otherwise here. Accordingly, the risk of multiple taxation is as small here as with the tax at issue in *Goldberg*. Plaintiffs failed to introduce any evidence that any taxpayer in Arkansas or elsewhere was ever subjected to multiple taxation as a result of Act 27. Furthermore, although *Goldberg* does not require the specific credit provision found in the Illinois statute, the same protection against multiple taxation is provided through Arkansas' membership in the Multi-State Tax Compact, which ensures against multiple taxation. This is buttressed by the testimony of Mr. Hawkins, who stated that in all instances of potential multiple taxation, the State would defer its own tax.

Finally, as the Supreme Court noted, alternative allocation methods based on mileage or geography cannot feasibly be implemented, given the intangibles and complexities inherent to current telecommunication technology. Since the Illinois tax applied to access charges, just as Act 27 does here, obviously this particular part of the Supreme Court's ruling in *Goldberg* controls the question whether access charges should be apportioned. Accordingly, following *Goldberg*, Act 27 also is externally consistent, so that the second prong of the *Complete Auto* test also is met.

27. The third prong is whether the tax discriminates against interstate commerce. Such discrimination could occur in two ways. First, if Act 27 taxed only interstate long-distance communications, but not intrastate long-distance communications, discrimination would be facial. This, however, is not the case: Act 27 specifically provides that intrastate long distance telecommunications are subject to the tax. Ark. Code Ann. § 26-52-301(3)(A)(iii)(a). *See Goldberg*, 57 U.S.L.W. at 4073. The second form of discrimination could occur where the interstate long-distance telecommunications bear a disproportionately larger share of the tax burden. Plaintiffs posit this argument here, relying on the United States Supreme Court's decision in *American Trucking Assns. Inc. v. Scheiner*, ___ U.S. ___, 107 S. Ct. 2829 (1987). In *Scheiner*, the Court invalidated Pennsylvania's flat tax on trucks operated on the state's highways as discriminatory against interstate commerce. That decision led to the invalidation of a similar Arkansas highway truck tax. However, in *Goldberg*, the Supreme Court distinguished *Scheiner* on two grounds. First, the tax in *Scheiner* burdened out-of-state truckers who did not have the same access to legislative change as do the Illinois telecommunications users, who are the burdened parties and who are Illinois residents. *Goldberg*, 57 U.S.L.W. at 4074. Second, *Scheiner* dealt with a measurable activity -- truck mileage on state highways. *Id.* In contrast, *Goldberg* focused on the "exact path of thousands of electronic signals [that] can be neither traced nor recorded." *Id.* Accordingly, the Supreme Court upheld the Illinois

tax on the third element of the Complete Auto test. *Id.* Following *Goldberg*, Act 27 thus meets the third prong of *Complete Auto*.

28. The fourth prong of the *Complete Auto* test focuses on the relationship of the tax to the benefits provided the taxpayer by the State. Again applying *Goldberg*, there is a sufficient relationship between the taxed event -- an interstate long-distance telecommunication -- and the benefits accorded by Arkansas. Certainly, calls originated within Arkansas meet this prong because origination is "perhaps the most critical step in the taxable event [.]" *Goldberg v. Johnson*, 512 N.E.2d at 1267. Similarly, as to calls originated outside Arkansas that terminate at an Arkansas number, the mechanics that must occur in Arkansas in order for the call to reach its terminating point are just as critical. As the Supreme Court ruled in *Goldberg*:

> The tax which may be imposed on a particular interstate transaction need not be limited to the cost of the services incurred by the State on account of that particular activity . . . . On the contrary, "interstate commerce may be required to contribute to the cost of providing *all* government services, including those services from which it arguably receives no direct 'benefit.' " . . . . The fourth prong of *Complete Auto* test thus focuses on the wide range of benefits provided to the taxpayer, not just the precise activity connected to the interstate activity at issue . . . .

57 U.S.L.W. at 4074 (citations omitted; emphasis in original). Accordingly, the Court proceeded to hold that the Illinois tax is fairly related to the benefits received by Illinois telephone customers, which go beyond the exact services provided to the equipment used in each interstate telephone call. We have precisely the same situation here, and *Goldberg* controls. Accordingly, Act 27 also meets the fourth prong of the *Complete*

Auto test.

29. The evidence of record and the precedent now available to the Court demonstrate that Act 27 satisfied the four-prong test articulated in *Complete Auto*. Thus, plaintiffs' claim that the tax violates the commerce clause must be rejected.

CONCLUSION

Based on the foregoing findings of fact and conclusions of law, it is hereby ORDERED, ADJUDGED and DECREED that plaintiffs' complaint be dismissed, with defendants' costs taxed against plaintiffs.

ENTERED this 19th day of May, 1989.

/s/ Ellen B. Brantley
Ellen B. Brantley
Chancellor
May 19, 1989

APPENDIX F

CONSTITUTION OF ARKANSAS.

Art. 7 (Judicial Article)

§ 1. Judicial power vested in courts.

The judicial power of the State shall be vested in one Supreme Court, in circuit courts, in county and probate courts, and in justices of the peace. The General Assembly may also vest such jurisdiction as may be deemed necessary in municipal corporation courts, courts of common pleas, where established, and, when deemed expedient, may establish separate courts of chancery.

* * *

§ 4. Jurisdiction and powers of Supreme Court.

The Supreme Court, except in cases otherwise provided by this Constitution, shall have appellate jurisdiction only, which shall be coextensive with the State, under such restrictions as may from time to time be prescribed by law. It shall have a general superintending control over all inferior courts of law and equity; and, in aid of its appellate and supervisory jurisdiction, it shall have power to issue writs of error and supersedes, certiorari, habeas corpus, prohibition, mandamus and quo warranto, and, other remedial writs, and to hear and determine the same. Its judges shall be conservators of the peace throughout the State, and shall severally have power to issue any of the aforesaid writs.

* * *

§ 9. Special judges.

In case all or any of the judges of the Supreme Court shall be disqualified from presiding in any cause or causes the court or the disqualified judge shall certify the same to the Governor, who shall immediately commission the requisite number of men learned in the law to sit in the trial and determination of such causes.

* * *

APPENDIX G

Selected Portions of the Arkansas Code Annotated of 1987 (Ark. Code Ann. § 26-52-301(3)(A) (as in effect both before and after amended by § 2 of Act 27 of 1987, on February 11, 1987) (Gross Receipts (Sales) Tax)

Before Amendment:

26-52-301. Tax levied.

There is levied an excise tax of three percent (3%) upon the gross proceeds or gross receipts derived from all sales to any person of the following:

* * *

(3)(A) Service by telephone and telegraph companies to subscribers or users, including transmission of messages, whether local or long distance. This shall include all service and rental charges having any connection with transmission of any message.

* * *

After Amendment:

26-52-301. Tax levied.

There is levied an excise tax of three percent (3%) upon the gross proceeds or gross receipts derived from all sales to any person of the following:

* * *

(3)(A)(i) Service by telephone, telecommunications, and telegraph companies to subscribers or users, including transmission of messages or images, whether local or long distance.

(ii) Taxable services shall include basic local service and rental charges, including all installation and construction charges and all service and rental charges having any connection with transmission of any message or image.

(iii) Except as provided in subdivision (3)(iv) of this section, taxable long distance services shall include:

(a) Long distance messages which originate and terminate within this state;

(b) Interstate long distance messages which originate within this state and terminate outside this state and are billed to an Arkansas telephone number or customer location;

(c) Interstate long distance messages which originate outside of this state and terminate within this state and are billed to an Arkansas telephone number or customer location.

(iv) However, the following services shall not be subject to the tax:

(a) Any interstate private communications service which is not accessible by the public;

(b) Any interstate service which allows access to private telephone lines and which is not accessible by the public; or

(c) Any interstate-wide area telecommunications service or other similar service which entitles the subscriber to make or receive an unlimited number of communications to or from persons having telecommunications service in a specified area which is

outside the state in which the station provided with this service is located.

(v) This tax shall apply to all customer access line charges billed to an Arkansas telephone number. Access line charges are those charges associated with or for access to the long distance network. However, access or other telecommunication services provided to telephone, telegraph, or telecommunications companies which will be used to provide telecommunications services shall not be subject to this tax.

APPENDIX H
Act 27 of 1987

State of Arkansas
76th General Assembly
Regular Session, 1987
By: Senator Gibson

A Bill

SENATE BILL 196

As engrossed 1-28-87 As engrossed 1-28-87 As engrossed 2-9-87

For An Act To Be Entitled

"AN ACT TO REQUIRE COLLECTION OF THE ARKANSAS COMPENSATING (USE) TAX BY OUT-OF-STATE VENDORS WHO SOLICIT ARKANSAS SALES BY MEANS OF ADVERTISEMENTS IN NEWSPAPERS, MAIL ORDER OR CATALOG PUBLICATIONS, RADIO OR TELEVISION; TO REQUIRE COLLECTION OF THE ARKANSAS GROSS RECEIPTS TAX BY PROVIDERS OF INTERSTATE TELECOMMUNICATIONS SERVICES; AND FOR OTHER PURPOSES."

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:

* * *

SECTION 2. Subsection (c)(1) of Section 3 of Act 386 of 1941, as amended, [Ark. Stat. Ann. § 84-1903(c)(1)], is hereby amended to read as follows:

(c)(1) Service by telephone, telecommunications and telegraph companies to subscribers or users, including transmission of messages or images, whether local or long distance. Taxable

services shall include basic local service and/or rental charges, including all installation and construction charges and all service and rental charges having any connection with transmission of any message or image. Except as provided below, taxable long distance services shall include (a) long distance messages which originate and terminate within this State; (b) interstate long distance messages which originate within this State and terminate outside this State and are billed to an Arkansas telephone number or customer location; (c) interstate long distance messages which originate outside of this State and terminate within this State and are billed to an Arkansas telephone number or customer location. Provided however, the following services shall not be subject to the tax:

1. Any interstate private communications service which is not accessible by the public.

2. Any interstate service which allows access to private telephone lines and which is not accessible by the public; or

3. Any interstate wide area telecommunications service or other similar service which entitles the subscriber to make or receive an unlimited number of communications to or from persons having telecommunications service in a specified area which is outside the state in which the station provided with this service is located.

This tax shall apply to all customer access line charges billed to an Arkansas telephone number. Access line charges are those charges associated with or for access to the long distance network. Provided, however, that access or other telecommunication services provided to telephone, telegraph, or telecommunications companies which will be used to provide telecommunications services shall not be subject to this tax.

SECTION 3. All laws and parts of laws in conflict with this Act are hereby repealed.

SECTION 4. EMERGENCY. It is hereby found and determined by the General Assembly that in-state sellers of property and services are being discriminated against as a result of out-of-state vendors, who solicit sales by advertisements, not being required to collect and pay to the State compensating (use) tax upon such sales that, as a result of the foregoing, this State is being deprived of much-needed revenue to which it is rightfully entitled; that providers of interstate telecommunication services have not been required to collect and remit gross receipts tax on interstate access and long distance telecommunications services which are hereby declared to be subject to the gross receipts tax. Therefore, an emergency is hereby declared to exist and this Act being necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval.

/s/ Gibson

APPROVED BY/s/ Bill Clinton
GOVERNOR

2/11/87

APPENDIX I

ARKANSAS CODE OF JUDICIAL CONDUCT

(The Arkansas Code of Judicial Conduct was adopted by the Arkansas Supreme Court by *per curiam* orders of November 5, 1973 and June 6, 1988, with a few modifications, from the Code of Judicial Conduct promulgated and adopted by the House of Delegates of the American Bar Association on August 16, 1972)

CANON 1

A JUDGE SHOULD UPHOLD THE INTEGRITY AND INDEPENDENCE OF THE JUDICIARY

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should himself observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.

CANON 2

A JUDGE SHOULD AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY IN ALL HIS ACTIVITIES

A. A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

B. A judge should not allow his family, social, or other relationships to influence his judicial conduct or judgment. He should not lend the prestige of his office to advance the private interests of others; nor should he convey or permit others to

convey the impression that they are in a special position to influence him. He should not testify voluntarily as a character witness.

CANON 3

A JUDGE SHOULD PERFORM THE DUTIES OF HIS OFFICE IMPARTIALLY AND DILIGENTLY

The judicial duties of a judge take precedence over all his other activities. His judicial duties include all the duties of his office prescribed by law. In the performance of these duties, the following standards apply:

A. ADJUDICATIVE RESPONSIBILITIES

(1) A judge should be faithful to the law and maintain professional competence in it. He should be unswayed by partisan interests, public clamor, or fear of criticism.

(2) A judge should maintain order and decorum in proceedings before him.

(3) A judge should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom he deals in his official capacity, and should require similar conduct of lawyers, and of his staff, court officials, and others subject to his direction and control.

(4) A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider *ex parte* or other communications concerning a pending or impending proceeding. A judge, however, may obtain the advice of a disinterested expert on the law applicable to a

proceeding before him if he gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.

* * *

C. DISQUALIFICATION.

(1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:

(a) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(c) he knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(d) he or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) is acting as a lawyer in the proceeding;

(iii) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) is to the judge's knowledge likely to be a material witness in the proceeding.

(2) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

* * *

D. REMITTAL OF DISQUALIFICATION.

A judge disqualified by the terms of Canon 3C(1)(c) or Canon 3C(1)(d) may, instead of withdrawing from the proceeding, disclose on the record the basis of his disqualification. If, based on such disclosure, the parties and lawyers, independently of the judge's participation, all agree in writing that the judge's relationship is immaterial or that his financial interest is insubstantial, the judge is no longer disqualified, and may participate in the proceeding. The agreement, signed by all parties and lawyers, shall be incorporated in the record of the proceeding.

* * *

CANON 7

A JUDGE SHOULD REFRAIN FROM POLITICAL ACTIVITY INAPPROPRIATE TO HIS JUDICIAL OFFICE

A. POLITICAL CONDUCT IN GENERAL

(1) A judge or a candidate for election to judicial office should not:

(a) act as a leader or hold any office in a political organization;

(b) make speeches for a political organization or candidate or publicly endorse a candidate for public office;

(c) solicit funds for or pay an assessment or make a contribution to a political organization or candidate, attend political gatherings, or purchase tickets for political party dinners, or other functions, except as authorized in subsection A(2).

(2) A judge holding an office filled by public election between competing candidates, or a candidate for such office, may, only insofar as permitted by law, attend political gatherings, speak to such gatherings on his own behalf when he is a candidate for election or reelection, identify himself as a member of a political party, and contribute to a political party or organization.

(3) A judge should resign his office when he becomes a candidate either in a party primary or in a general election for a non-judicial office, except that he may continue to hold his judicial office while being a candidate for election to or serving as a delegate in a state constitutional convention, if he is otherwise permitted by law to do so.

(4) A judge should not engage in any other political activity except on behalf of measures to improve the law, the legal system, or the administration of justice.

* * *

(ADDENDUM)
COMPLIANCE WITH THE CODE OF JUDICIAL CONDUCT

Anyone, whether or not a lawyer, who is an officer of a judicial system performing judicial functions, including an officer such as a referee in bankruptcy, special master, court commissioner, or magistrate, is a judge for the purpose of this Code. All judges should comply with this Code except as provided below.

A. PART-TIME JUDGE

A part-time judge is a judge who served on a continuing or periodic basis, but is permitted by law to devote time to some other professional or occupation and whose compensation for that reason is less than that of a full-time judge. A part-time judge:

(1) is not required to comply with Canon 5C(2), D, E, F, and G, and Canon 6C;

(2) should not practice in the court on which he or she serves or in any other court in the same county over which a part-time judge presides. He or she should not appear as counsel on appeal in any case which originates or arises in the court over which he or she presides.

B. JUDGE PRO TEMPORE

A judge *pro tempore* is a person who is appointed to act temporarily as a judge.

(1) While acting as such, a judge *pro tempore* is not required to comply with Canon 5C(2), (3), D, E, F, and G, and Canon 6C.

(2) A person who has been a judge *pro tempore* should not act as a lawyer in a proceeding in which he has served as a judge or in any other proceeding related thereto.

* * *

APPENDIX J

TRIAL TRANSCRIPT (R. 642–646)

(Transcript of oral discussion at the close of the trial among Chancellor Brantley (trial judge), taxpayers' counsel (Mr. Sayre) and counsel for AT&T (Mr. Schlumberger), while Chancellor Brantley orally expounded upon her reasoning in deciding the Equal Protection issue against the challenging taxpayers)

THE COURT: Are there any more facts I need to find or conclusions of law I need to reach?

MR. SAYRE: Your Honor, you said that the main difference between the WATS-like services and the MTS services, in your mind, was the billing structure.

THE COURT: Yeah, I did say that.

MR. SAYRE: And that is the basis on which the companies are able to administer the law and make their determination. Needless to say, I don't think it's quite as close a question as you do, but I wonder if there are any other factors that you would like...

THE COURT: May[be] I ought to get a suggestion.

* * *

THE COURT: Would anybody like to suggest since, perhaps, the record will not be as you would like it, such other differences that I could find exists between MTS and WATS and WATS-like services?

MR. SAYRE: We don't think there's any.

THE COURT: I understand you don't. I want to see what anybody else wants to say and then I want to see if I want to find that as a fact or not find it as a fact.

MR. SCHLUMBERGER: Now, as far as talking about MTS, when you say WATS you're including ... are you including all the tax exempt or non-taxed service?

THE COURT: I'm using what I understand today's jargon to be, which is WATS and WATS-like services. Right?

* * *

MR. SCHLUMBERGER: Right. But I think the basis ... you say that the structure of billing is different. I think you would be also correct in saying that, as a general rule, the WATS-like services are going to be used by the larger ...

THE COURT: Right. The billing structure is such that WATS is not attractive to a customer who does not have a high volume of usage.

MR. SCHLUMBERGER: Right.

THE COURT: I mean, once you get to that volume and you buy WATS, what you get when you buy WATS is the same thing I get when I buy MTS. That is, you can pick up a phone and you can dial somebody who's not here.

* * *

THE COURT: Right. I guess what Mr. Schlumberger is saying that he doesn't know of any real difference between WATS and MTS either, other than a billing structure which makes WATS practical only to those who are higher volume users.

* * *

MR. SCHLUMBERGER: In the conditions of the service there probably isn't any significant difference. I'd have to check the record on that myself. But ...

THE COURT: That's my only recollection of the testimony, and, frankly, I want this opinion to be honest. If the Supreme Court doesn't believe that is enough to allow a different taxing system, then I want them to reverse me. I mean, I do not find that you can tell any difference between MTS and WATS based on anything other than how they are billed, and your election to be billed one way or another depends upon the telephone service outside of local exchanges.

* * *

Supreme Court, U.S.
FILED
OCT 29 1991
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No. 91-583

In the Supreme Court of the United States

OCTOBER TERM, 1991

HUGH H. BOSWORTH, JR., *et al.*,
PETITIONERS

v.

TIMOTHY J. LEATHERS, Commissioner of Revenues, *et al.*,
RESPONDENTS

ARKANSAS TELEPHONE ASSOCIATION, INC.,
INTERVENOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

BRIEF FOR RESPONDENT US SPRINT COMMUNICATIONS COMPANY LIMITED PARTNERSHIP

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UNITED TELECOMMUNICATIONS, INC.

QUESTIONS PRESENTED

US Sprint Communications Company Limited Partnership ("US Sprint") is responding only to Question 1 of Petitioner's Petition.

1. Does the exemption from the Arkansas Sales Tax of wide-area telephone service ("WATS") deny subscribers to regular long-distance telephone service ("MTS"), which is subject to the tax, equal protection of the law under the Fourteenth Amendment?

List of Parties and Rule 29.1 Statement

Respondent US Sprint concurs in Petitioner's list of the parties, but notes to the Court, in accordance with Rule 29.1, that US Sprint is a Delaware limited partnership owned[1] 80.1% by United Telecommunications, Inc., and 19.9% by GTE Corporation. US Sprint holds direct and indirect interests in subsidiary corporations, all of which it wholly owns[2] except for the following: (1) Plessey-Telenet, Limited, owned 49% by US Sprint, (2) Sprint Networks USSR, owned 50% by US Sprint, and (3) ACE Telemail International, Inc. (Japan), owned 35% by US Sprint.

[1]Ownership of US Sprint by its parent companies is through their ownership of the general and limited partners of US Sprint Communications Company Limited Partnership. In particular, United Telecommunications, Inc., owns 100% of US Sprint's general partner, US Telecom, Inc., which owns a 50% interest in the partnership. US Sprint has two corporate limited partners: (1) UCOM, Inc., owning a 30.1% partnership interest and owned 100% by United Telecommunications, Inc., and (2) GTE Communications Services Incorporated, owning a 19.9% partnership interest and owned 100% by GTE Corporation.

[2]Some of US Sprint's foreign subsidiaries are required by local law to have a number of shares owned by members of the board of directors. US Sprint regards these as "wholly owned" for purposes of this statement.

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ARKANSAS TELEPHONE ASSOCIATION, INC.,
INTERVENOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

BRIEF FOR RESPONDENT US SPRINT COMMUNICATIONS COMPANY LIMITED PARTNERSHIP

US Sprint Communications Company Limited Partnership ("US Sprint") respectfully requests that this Court deny the Petition for a Writ of Certiorari seeking review of the Supreme Court of Arkansas' opinion in this case. That opinion is reported at 305 Ark. 598, 810 S.W.2d 918.

STATEMENT OF THE CASE

US Sprint concurs in the statement of the case as set out by Respondent State of Arkansas in its brief in response to the Petition.

REASONS FOR DENYING THE PETITION

Petitioner contends that there are important reasons under Rule 10.1(a), (b), and (c) for the Court to grant a writ of certiorari in this case. Petition 14. The Petition, however, fails to support

this contention with respect to Question 1. First, Petitioner does not even attempt to demonstrate a conflict among the federal courts of appeal under Rule 10.1(a). This case involves a state court decision and Rule 10.1(a) is wholly inapplicable.

Second, Rule 10.1(c) is inapplicable because this case is not a case of first impression involving an question of federal law. The question[3] presented here is whether a tax preference to promote local economic development may tax some and not others without offending the Equal Protection Clause of the Fourteenth Amendment. This Court has said that such tax preferences do not offend the Equal Protection Clause on several occasions in the past. *See, e.g., Lenhausen v. Lake Shore Auto Parts*, 410 U.S. 356 (1973)(upholding taxation of corporations but exemption of individuals from Illinois ad valorem personal property tax); *Allied Stores of Ohio v. Bowers*, 358 U.S. 522 (1959)(upholding exemption from Ohio ad valorem tax of goods stored in warehouses by non-residents but not by residents); *Carmichael v. Southern Coal & Coke Company*, 301 U.S. 495 (1936) (upholding Alabama's unemployment tax even though it exempted small employers and employers in certain industries).

Finally, Petitioner argues that a conflict exists among the states under Rule 10.1(b) of sufficient importance for this Court to resolve. Petitioner's citation of *Sattelink of Chicago v. Chicago*, 523 N.E.2d 13 (Ill. App. 1 Dist. 1988), does not show such a conflict, however, because it does not represent a decision of that state's highest court as required by Rule 10.1(b). What remains is Petitioner's contention that the decision of the Arkansas Supreme Court in this case so conflicts with the decision of the Wisconsin Supreme Court in *GTE Sprint Communications Corporation v. Wisconsin Bell*, 454 N.W.2d 797 (Wis. 1990), to merit review by this Court. US Sprint responds to this aspect of the Petition because of its involvement in both cases and its conviction that no such conflict exists.

Petitioner contends that *GTE Sprint* involves "virtually the same factual situation" as this case. Petition 14. This is not true. To show how dissimilar these two cases are, US Sprint will briefly discuss certain structural features of retail sales taxes

[3]It may be that Petitioner cites Rule 10.1(c) in connection with Question 2, regarding the Due Process challenge to Governor Clinton's appointment of special justices. However, because the Petition was unclear on this point, US Sprint assumes that Petitioner cited the Rule in support of granting writ of certiorari on both Questions.

generally and then discuss how these two cases address themselves to fundamentally different issues with respect to the sales tax statutes involved in each case.

I

RETAIL SALES TAX STATUTES TYPICALLY INCLUDE EXCEPTIONS TO THE TAX TO SUPPORT IMPORTANT STRUCTURAL FEATURES OF THE TAX. AMONG THESE ARE EXCEPTIONS TO PRESERVE THE RETAIL NATURE OF THE TAX, TO PRESERVE THE CONSTITUTIONALITY OF THE TAX, TO AVOID DOUBLE TAXATION, TO AID IN ADMINISTRATION OF THE TAX, AND TO PROMOTE A VARIETY OF LEGISLATIVE POLICIES.

After this Court clarified the permissible scope of retail sales taxes under the Equal Protection and Commerce Clauses[4], the retail sales taxes (and their complementary use taxes)[5] enacted by most states have taken on a stereotypical structure, some of the features of which are relevant to distinguishing the Wisconsin and Arkansas decisions. First, sales taxes are typically only imposed at the "retail" or consumer level in the chain of commercial activity.[6] It is sometimes difficult to say whether a particular sales transaction is a retail transaction. For example, it is clear that restaurants are retailers of food, for their product is quite literally "consumed" by their customers. Yet it is difficult to say whether cooking grease purchased by a restaurant is consumed by the restaurant, by the resautrant's customer, or both. Both legislatures and courts may have to engage in some imaginative analysis to answer the very practical question of whether a restaurant must pay its supplier sales tax on its cooking grease purchases.

Second, sales taxes are typically imposed *comprehensively*

[4] *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33 (1939); *Heneford v. Silas Mason Co.*, 300 U.S. 577 (1937); *Stewart Dry Goods v. Lewis*, 294 U.S. 550 (1935).

[5] For purposes of this response, Respondent will use the term "sales tax" without regard to the distinctions between traditional sales taxes and gross receipts or privilege taxes. While those distinctions are important in some contexts, they are not relevant to the points made in this brief.

[6] *See, e.g.*, Ark. Code. Ann. §26-52-401(12); Wis. Stat. §77.52.

on sales of tangible personal property ("goods") but, *selectively*, if at all, on sales of services.[7] Where services are taxed, the statute will typically enumerate those services subject to the tax. As more states attempt to increase revenues from their sales taxes, they are experimenting with taxation of new classes of services. One of these services is telecommunications. It is not surprising, therefore, that states venturing into these areas, including Wisconsin and Arkansas, have and will be called upon to apply the settled principles of retail sales taxation to these new service industries. But this does not imply that every sales tax case involving telecommunications, or any other newly-taxed service, involves "virtually identical" factual or legal questions.

Finally, from the class of all goods and services subject to sales taxation, most states except various goods and services from taxation, either through definitional exceptions or through statutory exemptions. These exceptions often are crucial to the structure of the tax. In fact, most exceptions fall into one of a handful of categories.

1. *Wholesale exceptions.* Some exceptions exist to preserve the "retailness" of the tax, declaring certain sales to be wholesale rather than retail by legislative fiat.[8] These exceptions normally involve transactions in the grey area between wholesale and retail. For example, it is not uncommon to see an exception for sales of containers.

2. *Constitutionality exceptions.* Some exceptions exist to protect the tax from real or perceived (at the time of en-

[7] *See, e.g.*, Ark Stat. Ann. §26–52–301; Wis. Stat. §77.52.

[8] *See, e.g.*, Ark. Code Ann. §26–52–307 (declaring sales of construction materials to contractors to be retail sales, even though the materials are resold in the form of real estate); Ark. Code Ann. §26–52–401(12)(B)(exempting ingredients or components incorporated into manufactured products); Ark. Code Ann. §26–52–401(23) (exempting sales of unprocessed crude oil); Ark. Code Ann. §26–52–401(24) (exempting sales of electricity used in the manufacture of aluminum by the electrolytic process); Ark. Code Ann. §§26–52–404 and 26–52–405 (exempting feed used in raising livestock and poultry); Ark. Code Ann. §26–52–408 (exempting sales of certain packaging materials); Wis. Stat. §77.535(3m) (seed, fertilizer, pesticides, etc. exempt); Wis. Stat. §77.54(6)(b) (exemption for containers); Wis. Stat. §77.54(23m) (exemption for lease or sale of motion pictures to theaters—admission to theaters is taxable); Wis. Stat. §77.54(27) (exemption for sale of semen used for artificial insemination of livestock).

actment) challenges to the constitutionality of the tax.[9] Examples of this kind include are exemptions for interstate sales, exemptions for sales to federal agencies, and exemptions for sales of newspapers.

3. *Double tax exceptions.* Some exceptions prevent certain products from being subjected to tax under multiple taxing statutes. Sales of gasoline are often exempt from general sales taxes, because they are subject to an excise tax.[10]

4. *Administrative exceptions.* Some exceptions exist for administrative convenience.[11] A state may exempt casual sales among private individuals (a "garage sale" exception) to avoid the burden of fairly enforcing the tax on a large number of small sales. Likewise, sales taxes typically exempt sales to state agencies to avoid the absurd prospect of the state collecting the tax from itself.

5. *Policy exceptions.* Finally, the broadest group of exceptions exist to promote some policy important to the state legislature. Examples of such exceptions include exemptions for prosthetic devices, exemptions for sales to charitable organizations, enterprise zone exemptions, and so forth.[12]

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[9] *See, e.g.*, Ark. Code Ann. §26–52–401(4) (exempting sales of newspapers); Ark. Code Ann. §26–52–401(5) (exempting sales to the United States); Wis. Stat. §77.54(1) (exempting sales the state is constitutionally prohibited from taxing); Wis. Stat. §77.55(1) (exempting sales to the federal government); Wis. Stat. §77.55(2) (exempting sales delivered out of state or to an exporter for delivery outside the United States); Wis. Stat. §77.54(15) (exempting sales of newspapers or periodicals).

[10] *See, e.g.*, Ark. Code Ann. §26–52–401(11) (exempting sales of motor fuels subject to motor fuels tax); Wis. Stat. §77.54(15) (exempting sales of motor fuels and aviation fuel taxed by Wis. Stat. ch. 78).

[11] *See, e.g.*, Ark. Code Ann. §26–52–401(17) (exempting "isolated sales" not made by an established business); Wis. Stat. §77.54(7) (exempting isolated or occasional sales).

[12] *See., e.g.*, Ark. Code Ann. §§26–52–401(1) to (3), (6) to (10), (21), (25) and 26–52–413 to 414 (exempting sales to various charitable organizations); Ark. Code Ann. §26–52–401(18)(C) to (D) (exempting sales of certain farm products directly to consumers); Ark. Code Ann. §26–52–401(19) (exempting sales of food to governmental agencies for free distribution); Ark. Code Ann. §26–52–401(20) (exempting certain sales of medical equipment); Ark. Code Ann. §26–52–401(27) (exempting sales of food purchased under certain governmental food assistance programs); Ark. Code Ann. §26–52–

II.

THE SALES TAX EXCEPTION AT ISSUE BEFORE THE WISCONSIN SUPREME COURT IN *GTE SPRINT* WAS AN EXCEPTION TO PRESERVE THE RETAIL NATURE OF THE WISCONSIN SALES TAX.

The *GTE Sprint* case involved an exception of the first kind, a definitional exception designed to preserve the retail nature of the tax by legislatively declaring certain sales of telecommunications services, namely "access" services, to be retail and others wholesale. As the Wisconsin court explained, *GTE Sprint*, 454 N.W.2d at 799, completion of a long-distance telephone call potentially involves three parties: (1) the local telephone company at the point of origination, (2) the long-distance telephone company, and (3) the local telephone company at the destination point. In order for a long-distance company to sell a long-

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402 (exempting sales of machinery and equipment used directly in manufacturing); Ark. Code Ann. §26–52–403 (exempting certain sales of agricultural machinery and equipment); Ark. Code Ann. §26–52–406 (exempting sales of prescription medicine and medical oxygen); Ark. Code Ann. §26–52–407 (exempting sales of large river barges); Ark. Code Ann. §26–52–412 (exempting sales of admission to athletic and inter-scholastic events at primary and secondary schools); Ark. Code Ann. §26–52–415 (exempting sales of automobiles to blind veterans); Wis. Stat. §77.54(3) (exempting sales of certain agricultural equipment); Wis. Stat. §77.54(4) (exempting sales to elementary and secondary schools); Wis. Stat. §77.54(6)(a) (exempting certain sales of manufacturing equipment); Wis. Stat. §77.54(9) (exempting sales of admission to primary and secondary school events); Wis. Stat. §77.54(10) (exempting sales of admission to museums operated under agreement with the state historical societies); Wis. Stat. §77.54(14) (exempting sales of prescription medicine); Wis. Stat. §77.54(16) (exempting sales of fire-fighting equipment to volunteer fire departments); Wis. Stat. §77.54(20) (exempting sales of food and beverages); Wis. Stat. §77.54(21) (exempting sales of caskets); Wis. Stat. §77.54(22) (exempting sales of prosthetic devices); Wis. Stat. §77.54(24) (exempting sales of central office equipment to telephone companies); Wis. Stat. §77.54(26) (exempting sales of component parts incorporated into waste treatment facilities); Wis. Stat. §77.54(28) (exempting sales of diabetic care devices); Wis. Stat. §77.54(29) (exempting sales of equipment used in the production of maple syrup); Wis. Stat. §77.54(30) (exempting certain sales of home-heating fuels); Wis. Stat. §77.54(34) (exempting sales of dairy supplies); Wis. Stat. §77.54(35) (exempting sales of admission to American Legion baseball teams); Wis. Stat. §77.54(39) (exempting certain sales of off-highway heavy mechanical equipment).

distance phone call to its customers, it must purchase access to the local telephone companies at both the originating and terminating points. The long-distance company bundles this access with transmission between the two local service areas to provide its customer with an end-to-end long-distance connection. The long-distance consumer placing a long-distance telephone call is impervious to this series of sales and sees no indication on his bill that the sales took place: he simply receives a bill for the total price of the long-distance call.

The "long-distance" company might be one of the major long-distance companies ownimg national transmission facilities, such as AT&T, US Sprint, or MCI (the "facilities-based carriers" or the "interexchange carriers").[13] Or it might be a "reseller" of long-distance telephone service, a company that buys long-distance transmission in bulk from one of the facilities-based carriers, bundles it with access services purchased from local telephone companies, and sells end-to-end long-distance service to its customers. Finally, it is also possible that a local telephone company can provide originating access and transmission to the destination[14] but would have to purchase terminating access from another local telephone company at the terminating point. Thus, it possible that access would have to be purchased by (1) an inter-exchange carrier, (2) a reseller, or (3) a local telephone company, depending on which is providing the long-distance service to the customer.

The sales tax statute at issue in *GTE Sprint* imposed a sales tax on all retail sales of telephone service.[15] The defi-

[13]Strictly speaking, an "interexchange carrier" is any carrier that carries traffic between local telephone exchanges. In this brief, however, we use the term to describe only facilities-based carriers in order to be consistent with the manner in which the term is used in the Wisconsin provision at issue in *GTE Sprint*.

[14]Occasionally, a local telephone company can provide terminating access and transmission, but must buy originating access. Still the issue is the same whether it buys originating or terminating access.

[15]The Wisconsin sales tax imposed the tax on enumerated services, among them telecommunications services:

> Sec. 77.52(2). For the privilege of selling, performing, furnishing services described under par. (a) at retail in this state, a tax is hereby imposed at the rate of 5% of the gross receipts from the sale, performance or furnishing of the services.
>
> (a) The tax imposed herein applies to the following types of services:

nition of a "retail sale" under the Wisconsin statute specifically included "transfers of services *to an interexchange carrier* which permit the origination or termination of telephone messages between a customer in this state and one or more points in another local access and transport area ...." Wis. Stat. §77.51(14)(m)(emphasis added). By implication, such sales to long-distance providers who were not "interexchange carriers" were not considered "retail sales" and therefore not subject to the tax. *GTE Sprint*, 454 N.W.2d at 802. Thus, the Wisconsin sales tax imposed the tax on sales of access service to interexchange carriers (such as AT&T, US Sprint, and MCI) but not on sales of access to resellers or to local telephone companies.

The placement of the provision taxing sales of access—within the statute's definition of "retail sales"—indicates that the purpose of the legislature in distinguishing between sales of access to interexchange carriers and sales of access to resellers and local telephone companies was to draw a line between wholesale and retail sales of telecommunications services.[16] In other words, the Wisconsin legislature was attempting to preserve the retail nature of the tax.[17]

Having determined that the statute classified persons and having identified the governmental purpose sought to be advanced by the classification, the Wisconsin court then examined whether the classification advanced that purpose under

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> 5. The sale of telecommunications services of whatever nature ...including interstate services originating in this state and charged to a subscriber or telephone located in this state.

[16]The Wisconsin Court found that the questioned provision was added by the legislature after the state's revenue department ruled that sales of access were not "retail" sales, regardless of the identity of the buyer. *GTE Sprint*, 454 N.W.2d at 802. Thus, the provision was added, in part, to replace the revenue that would be lost because of the department's ruling. *Id.* All taxing statutes have that purpose in common. But this could not be the reason for distinguishing between sales to interexchange carriers and sales to others.

[17]The court also considered the state's argument that the purpose of the provision was to resolve a conflict between two state agencies on the nature of sales of access. *Id.* On further examination, however, the court concluded that no such conflict existed but, if it did, the conflict was over the retail nature of sales of access services. So the purported second purpose of the legislation was in actuality a restatement of the first.

the rational basis test. The court concluded that there was no rational basis for distinguishing sales of access to interexchange carriers from such sales to others for the purpose of distinguishing wholesale from retail transactions:

> Local exchange carriers, inter-LATA [*i.e.*, interexchange] carriers and resellers all purchase and use access services for the same purpose, to originate or terminate telecommunications. Yet the legislature has arbitrarily chosen to define only the transfer of access services to an inter-LATA carrier as a "sale." But when the legislature acts, it must do so within the bounds of the constitution. Equal protection requires that because each are similarly situated, if the transfer of access services to inter-LATA carriers is to be taxed, the same transfer to local exchange carriers and resellers must be taxed as well. To the extent that inter-LATA carriers "use or consume" access services in providing telecommunications services to their customers, so do interexchange [*sic*, local exchange] carriers and resellers. The effect here is to treat similarly situated persons disparately without a rational basis to support the distinction.

Id. at 803. Nowhere did the state argue that the purpose of the provision was to advance a legislative policy of encouraging the business of resellers and local telephone companies to the exclusion of interexchange carriers, as it would have had to argue to make the Wisconsin case comparable to this case.

III.

THE SALES TAX EXCEPTION AT ISSUE BEFORE THE ARKANSAS COURT BELOW WAS AN EXCEPTION TO PROMOTE A POLICY OF THE ARKANSAS LEGISLATURE AND IS, THEREFORE, NOT COMPARABLE TO THE WISCONSIN DECISION

The case the Court is asked to review here can be called "virtually identical" to the *GTE Sprint* case only on the most impressionistic reading of the two cases. It is true, both cases

involve a sales tax on telecommunications and both present equal protection challenges to those statutes. But familial resemblance is not identity. The classifications challenged, the purposes advanced for those classifications, and the rationales connecting the classifications to the purposes are unmistakably different.

In this case[18], the Arkansas sales tax provides an exemption from the tax for "wide-area telephone service," also called WATS. Although the statute classifies *services* rather than *persons*, US Sprint accepts, solely for the purpose of responding to the Petition, that the classification of the services effectuates a classification of persons within the meaning of the Fourteenth Amendment.[19] Because of the rate structure of WATS service,[20] it is uneconomical for low-volume consumers of long-distance service to subscribe to WATS service. Thus, while there are no restrictions on who may subscribe to WATS service, subscribers to WATS are undoubtedly high-volume, largely commercial, subscribers. In the sense that there is a high probability that a WATS subscriber is a commercial concern, it might be said that the Arkansas exemption classifies persons.[21]

Having accepted Petitioner's argument that the statute classifies persons within the meaning of the Fourteenth Amendment, the Arkansas Supreme Court concluded that a legitimate purpose for enacting the exemption might have been the promo-

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[18] *Bosworth v. Pledger*, 810 S.W.2d 918 (Ark. 1991)

[19] If the Court grants the Petition, however, Respondent reserves the right to contest this aspect of Petitioner's case on the merits as a subsidiary question fairly included within Question 1. The Arkansas Court stated that the statute's classification of *services* effectively classified the *subscribers* to those services:

> Although it is true that the tax is imposed on one type of long distance service and not another, it is also true that taxes are paid by individuals, and the record reflects that subscribers to "regular" long distance service pay the tax, while subscribers to WATS service do not. This disparate treatment under the statute of classes of individuals is sufficient to raise the equal protection challenge and require further analysis.

Bosworth, 810 S.W.2d at 921.

[20] WATS service is characterized by a flat monthly service fee charged irrespective of usage, plus a per-call charge at a rate lower than for regular message telephone service ("MTS"). *See* Petition n. 4(b) at 7.

[21] The Arkansas trial court found, and the Arkansas Supreme Court accepted, the finding that subscribers to WATS services, by economic force, tend to be commercial subscribers. *Id.* at 923.

tion of economic development within the state. And the court clearly said so:

> Testimony in the trial court indicated that WATS or WATS-like service tended to be used by large volume consumers of telephone service. It is not economically feasible to purchase WATS service unless the consumer has a large volume of telephone usage; thus the WATS customer is more likely to be a business subscriber than to be a residential subscriber.
>
> The State of Arkansas has a long history of providing tax incentives to commerce as a means to encourage businesses to stay and locate in this state, and, certainly, economic development is a legitimate and worthy governmental goal. For example, the "enterprise zone" legislation gives a tax advantage to industries that locate in economically depressed areas, Ark. Code Ann. §14–4–807 (Supp 1989), and the motion picture industry is accorded tax incentives in order to encourage film making in this state. Ark. Code Ann. §26–4–206 (1987), and §26–52–402(c)(3) (1987).
>
> The legislature may have intended, in the enactment of Section 2 of Act 27 of 1987, to encourage large volume users of telephone service, i.e., WATS subscribers, to remain or relocate in Arkansas.

Bosworth at 923.

This Court has emphasised that the Equal Protection Clause does not require the reviewing court to determine the *actual* purpose of the legislature in enacting a challenged classification; it need only find any legitimate purpose. The subjective motives of individual members of a legislature are often not expressed and may differ from member to member.

> We cannot assume that state legislative enactments were adopted arbitrarily or without good reason to further some legitimate policy of the State. What were the special reasons, motives or policies of the Ohio Legislature for adopting the questioned proviso we do not know, nor is it important that we should, *Southwestern Oil Co. v. Texas*, 217 U.S. 114, 126,

> for a state legislature need not explicitly declare its purpose.

Allied Stores of Ohio v. Bowers, 358 U.S. 522, 528 (1959).

After the Arkansas Supreme Court identified the classification and the purpose sought to be advanced by the purpose, it concluded that there was a rational basis for the legislature to conclude that the classification promoted that purpose.

> We agree with the chancellor's finding that this basis for legislation would be rationally related to achieving a legitimate governmental objective.

Bosworth at 923. The finding of the chancellor with which the Arkansas court agreed is stated in the legal conclusions portion of the trial court's opinion. Petition at 27a (opinion of the Chancery Court). There the trial court concluded that the exemption for high-volume users of long-distance service was rationally related to the legitimate legislative purpose of encouraging business and industry to locate in Arkansas. *Id.*

The Petitioner seems to be disturbed by the court's failure to linger on this point. The court did not engage in extensive analysis on how exactly a sales tax exemption might serve to promote the increase of commercial activity in the state. But that is not what the court is called upon to do under the law of equal protection as announced by this Court. *Carmichael* at 514–515. It need only conclude that the proposition that such an exemption would promote commercial activity in the state was more *rational* than *irrational*. Distinguishing degrees of rationality is the job of the legislature.

Furthermore, it seems the Petitioner would have the Court strike down the Arkansas decision because it fails to provide an exact match between subscribers to WATS and business users. This failure, the Petitioner argues, demonstrates the exemption's failure to adequately promote its purpose of promoting commercial activity in the state.

> However, the classification of whether to tax or not to tax interstate telephone services, based solely upon the regulatory rate structure for MTS interstate service, and WATS interstate service, does *not* further the objective of providing tax incentives to encourage businesses to stay or locate in Arkansas,

> because not *all* businesses are treated or taxed the same.

Petition at 24 (italics in original). The Petitioner wants to call heads and tails on the same toss. In order to get into the Equal Protection door, Petitioner argued that the WATS-MTS classification is tantamount to a classification dividing "large" consumers such as businesses from "small" consumers such as residential users. Petition Appendix at 24a. Once in the door, however, Petitioner argues that the statute should be stricken because it is too inefficient in this division.

The Arkansas and Wisconsin cases present radically different Equal Protection challenges to their respective statutes. The Wisconsin decision involved a classic retail-wholesale dispute that the Wisconsin Legislature attempted to resolve by a definitional distinction grounded in no real-world difference between the classes. The Arkansas decision in this case, by contrast, upheld a legislative policy exemption enacted to promote commercial activity in the state. It may be true, as Petitioner contends, that the exemption should have been made broader, or narrower, or not made at all. But the place to make such arguments is before the Arkansas Legislature, not the Arkansas courts, and not before this Court.

Conclusion

For the reasons stated herein, the Court should deny the Petition.

Respectfully Submitted,

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No. 91-583

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1991

HUGH H. BOSWORTH, JR., et al.
Petitioners

V.

TIMOTHY J. LEATHERS, Commissioner of Revenues; et al.
Respondents

ARKANSAS TELEPHONE ASSOCIATION, INC.
Intervenor

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

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QUESTIONS PRESENTED

I.

WHETHER § 2 OF ACT 27 OF 1987 VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT BY EXCLUDING FROM THE GROSS RECEIPTS TAX WIDE AREA TELECOMMUNICATIONS SERVICE (WATS) OR SIMILAR SERVICE WHILE SUBJECTING "REGULAR" (MTS) INTERSTATE LONG DISTANCE TELEPHONE SERVICES TO THE TAX.

II.

WHETHER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT WAS VIOLATED WHEN FOUR SPECIAL "APPOINTED" ASSOCIATE JUSTICES REFUSED TO RECUSE UPON A REQUEST, BY PETITIONERS, FOR RECUSAL WHICH ALLEGED THE APPEARANCE OF IMPROPRIETY AND QUESTIONED THE SPECIAL JUSTICES' IMPARTIALITY AND INDEPENDENCE.

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No. 91-583

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1991

HUGH H. BOSWORTH, JR., et al.
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TIMOTHY J. LEATHERS, Commissioner of Revenues; et al.
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ARKANSAS TELEPHONE ASSOCIATION, INC.
Intervenor

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

RESPONDENTS' BRIEF IN OPPOSITION

Timothy J. Leathers, Commissioner of Revenues, State of Arkansas; Jimmie Lou Fisher Lumpkin, Treasurer of the State of Arkansas; Floyd G. "Buddy" Villines, III, County Judge, Pulaski County, Arkansas; Patricia Tedford, Treasurer, Pulaski County, Arkansas; Pulaski County, Arkansas; and the City of Fayetteville, Arkansas, respectfully request this Court to deny the Petition for Writ of Certiorari filed by the Petitioners Hugh H. Bosworth, Jr., Walter Henningsen, Melissa Henningsen, Irene E. Scott and Henningsens, Incorporated seeking review of the Supreme Court of Arkansas' opinion in this case. That opinion is reported at 305 Ark. 598, 810 S.W.2d 918.

STATEMENT OF THE CASE

Respondents feel compelled to point out discrepancies between petitioners' Statement of the Case and the Findings of Fact (Pet. 21a) of the Chancellor.

Although petitioners allege that there are "no longer dedicated transmission lines for WATS services; (Pet. 6), the Findings of Fact, number 4, indicates the service may be over dedicated or non-dedicated lines. (Pet. 22a)

Petitioners allege that both MTS and WATS services are billed based upon time of day, day of week, length of time used and distance. (Pet. 6) Finding of Fact, number 4, states "Instead of incurring charges on a per-call, per-minute basis, the WATS subscriber is charged a flat rate for the service." (Pet. 22a)

Further, MTS and WATS do not use exactly the same type of facilities and there are differences other than in the rates charged. The record establishes that the technology behind each type of service is distinguishable. The method for placing the call, i.e. direct dialing, operator assistance or calling card, also affects MTS services. Anyone may call an MTS customer.

Additional technology, such as geographical bands and call screening, is used in WATS. (R. 707) There are two basic WATS services — Outbound WATS and Inbound WATS (800 service). Outbound WATS permits subscribers to call within a specific geographic band. Any calls outside this band are screened and charged as an MTS call. Operator assisted calls, collect calls or calling card calls are charged as MTS calls. Inward WATS or 800 Service only permits incoming calls from those in specific geographic areas. All other calls would

be MTS. Those outside the band could not use this service. Private Line Services are also distinguishable.

Footnote 4, Pet. 7, is from the petitioners' brief to the Supreme Court of Arkansas. A comparison of this with the Findings of Facts (Pet. 7) reveal several discrepancies.

The so-called "unfair competitive disadvantage" is addressed *infra,* as is the comment made by the Chancellor. The sessions of the Arkansas Legislature are not reported, and any comments thereto cannot be official comments.

SUMMARY OF THE ARGUMENT

There is no basis for granting the Petition for a Writ of Certiorari to the Arkansas Supreme Court in this case. First, petitioner cites only one "comparable" case for the proposition that there exists a conflict between the decision of the Supreme Court of Arkansas and decisions of other state courts of last resort, and that decision is readily distinguishable on its facts. All other cases cited are equally distinguishable. The issues raised are not important enough to warrant review. The Supreme Court of Arkansas fully considered the equal protection standards enumerated in this Court's prior decisions and correctly decided this case. There are numerous reasons that the recusal issue raised by petitioners does not warrant consideration. First, the Writ was not timely filed. Secondly, the petitioners' right to due process has not been violated. In addition, prior decisions of this Court are not in conflict with the decision herein.

REASONS WHY THE PETITION SHOULD BE DENIED

I.

NO CONFLICT EXISTS BETWEEN THE DECISION IN THIS CASE AND DECISIONS OF OTHER STATE COURTS OF LAST RESORT IN EQUAL PROTECTION CLAUSE BASED CHALLENGES TO STATE TAXES IMPOSED UPON TELEPHONE SERVICES AND THE SUPREME COURT OF ARKANSAS FULLY CONSIDERED AND DECIDED THE ISSUES.

Petitioners state at page 17 of its Petition, footnote 7,

> However, the Plaintiffs do note that this Court has already acknowledged the seriousness of a possible Equal Protection violation in this type of situation because the Equal Protection issue was remanded in *Medlock*.

Respondents agree that rights granted under the equal protection clause are important in this case, as well as in all matters. This Court did not, however, discuss the equal protection clause in the light petitioners have stated. The case was remanded because the equal protection issue was raised but not decided in the Supreme Court of Arkansas. The Court made its findings based upon First Amendment grounds.[1]

---

[1]Before the Arkansas Chancery Court, cable petitioners contended that the State's tax distinction between cable and other media violated the Equal Protection Clause of the Fourteenth Amendment as well as the First Amendment. . . . The Chancery Court rejected both claims, and cable petitioners challenged these holdings before the Arkansas Supreme Court. That Court did not reach the equal protection question as to the State's temporary tax distinction between cable and satellite services because it disallowed that distinction on First Amendment grounds. We leave it to the Arkansas Supreme Court to address this question on remand. *Leathers v. Medlock*, 111 S.Ct. 1438, 113 L.Ed.2d 494, 508 (1991).

No further direct reference to the equal protection clause is made in *Leathers v. Medlock*, 111 S.Ct. 1438, 113 L.Ed.2d 494 (1991).

Another area of the Petition which requires comment concerns petitioners' statement that

> . . . Act 27 of 1987 fails the two-part "rational basis test" . . . because there is neither a legitimate state purpose served by (1) merely encouraging the high volume usage of interstate telephone service, or (2) creating a competitive pricing advantage for "facility based IXCs" over their "reseller" competitors. (Citations Omitted)

Pet. 17.

Neither the Chancery Court nor the Supreme Court of Arkansas found that the exclusion of WATS or WATS-like services created a pricing advantage to one type of telecommunications provider over another provider. Petitioners did not raise any issue of discriminatory treatment of resellers in the trial court. Indeed, the reseller telecommunications provider was a defendant below.

a. Conflicts with Decisions of other State Appellate Courts

The decision of the Supreme Court of Arkansas does not conflict with *GTE Sprint Communications Corp. v. Wisconsin Bell, Inc.*, 454 N.W.2d 797 (Wis., 1990). These two cases are clearly distinguishable based upon the laws of the two states and the attendant facts. It should be noted that petitioners admit the *GTE Sprint* case is

> . . . the *only* comparable reported case addressing the question presented in this litigation.

Pet. 18.

Since the two cases are clearly distinguishable and there are no other comparable cases, the petition should be denied for the lack of conflict among other state courts of last resort.

The Wisconsin tax on the transfer of access services applied when the purchase was made by an inter-LATA carrier but not to the same purchase by a local exchange carrier or a reseller. All subscribers to "regular" or MTS services are taxed by the Arkansas statute and all subscribers to WATS or WATS-like services are not taxed. Both types of services are available to any customer with no eligibility requirement. (Private line services, which petitioners are not questioning here, are also available without any eligibility requirements.)

Petitioners have alleged that the case of *Satellink of Chicago, Inc. v. City of Chicago*, 523 N.E.2d 13 (Ill. App. 1. Dist., 1988) is in direct conflict with the Equal Protection analysis in this case.

Satellink challenged a Chicago amusement tax ordinance which provided for an expansion of the tax to subscription and cable television but which specifically excluded from the tax entities with whom Chicago had or would enter into a franchise agreement. The franchised cable systems paid a 5% gross receipts tax. The circuit court found the tax unconstitutional based upon first amendment grounds, but the appellate court indicates it made its decision on the basis of the equal protection clause.

Although petitioners state that the court found the

ordinance had no rational basis, it appears the decision is based upon the strict scrutiny and compelling interest standards and not the rational basis standard:

> The present case is controlled by application of equal protection analysis, in connection with first amendment interests.

523 N.E.2d 15.

A further indication that this case was not based on the rational basis test is found at 523 N.E.2d 17:

> No compelling government interest has been shown which justifies such action. Neither raising revenue nor equalizing the financial burden on cable television can support the targeting of subscription television.

The First Amendment analysis of the court in *Satellink* is similar to that in *Medlock, supra.* This Court held that the taxation of cable television services alone, or cable and satellite services, while exempting the print media, did not violate the First Amendment. When the First Amendment considerations are laid aside, very little analysis is left in *Satellink.*

The facts in *Satellink* are clearly distinguishable. Further, that case does not utilize the rational basis test in determining whether the equal protection clause has been violated.

Additional cases cited in footnote 9 of the Petition as being in conflict with the opinion of the Supreme Court of Arkansas in this case, where allegedly "objective" standards were applied are: *Northern Natural Gas Co. v. Board of Equalization and Assessment,* 443 N.W.2d 249 (Neb., 1989);

Amax (sic) *Magnesium Corp. v. State Tax Commission*, 496 P.2d 1256 (Utah, 1990); and *Associated Grocers, Inc. v. State*, 787 P.2d 22 (Wash., 1990), *cert. denied, Washington v. Associated Grocers, Inc.*, 111 S.Ct. 670 (1991).

In *Associated Grocers, supra*, wholesalers and distributors were taxed the same, but distributors were granted an exemption if the wholesaler from whom they made purchases paid the tax. The parties agreed that minimal scrutiny or the rational basis test was to be used. The court held that there was only one class of taxpayers, and since the members within that class were treated differently, there was no need to inquire further. Therefore, the court did not consider whether the classification had any relationship to the purposes of the statute. No references are made to the "objective" standards.

County assessments of property were made at eighty percent of value while state assessments of property were made at one hundred percent of value in *Amax, supra*. The court considered only the state constitutional question and not a federal question. No "objective" standards required by this Court were applied. The Utah Court found that the purpose of the statute was to equalize the tax burdens, and that there was no reasonable relationship between this statutory purpose and the classification. The case turned on the fact that the same assessment method was used by both assessors and that the purpose for the twenty percent county reduction was because the use of the cost appraisal method overvalued property. The court quoted a Utah case, *Blue Cross and Blue Shield v. State*, 779 P.2d 634, 637 (Utah 1989):

> in order to establish a violation of the equal protection component of the Utah Constitution

> with regard to taxation, a party must demonstrate that a law creates certain classes of persons and that the law is applied differently to each classification without a reasonably related legitimate government purpose.

The court here found a legitimate government purpose.

In *Northern Natural Gas, supra,* a request was made for "equalization of centrally assessed property." Enron, the parent company of Northern Natural Gas, requested this equalization based largely upon three U.S. District Court of Nebraska decisions. Three railroad companies challenged the property tax laws of Nebraska based upon discrimination under the Railroad Revitalization and Regulatory Reform Act of 1976, and they were successful. Enron requested that its property taxes be lowered to the level required by the District Court in the railroad cases. The taxes were equalized, although Nebraska statutes provided otherwise. The court found that the state by complying with the federal mandates denied Enron equal protection. The facts of this case are not even remotely similar to those before this Court.

Petitioners have cited no cases which indicate that the decision of the Supreme Court of Arkansas conflicts with decisions of other state courts of last resort. No such conflicts exist, and this case was correctly decided.

b. The Issue Is Not Important Enough to Warrant Review.

Petitioners are asking this Court to issue an advisory opinion on the application of the equal protection clause to taxation of new types of electronic communication services.

Yet, they have failed to show the extent of equal protection issues regarding the taxation of those services. For instance, only the statutes of two states are cited as taxing MTS services but not WATS services. It would be virtually impossible for this Court to provide guidance concerning every possible statutory scheme involving electronic communication services.

Medlock, supra, which involved the taxation of cable and satellite television subscription services, was decided by this Court on First Amendment grounds, and the case was remanded to the Supreme Court of Arkansas to address the equal protection question which had not been reached by that court.

Although the taxpayers in *Goldberg v. Sweet,* 488 U.S. 252, 102 L.Ed.2d 607, 109 S.Ct. 582 (1989) had raised equal protection and due process questions in the lower courts, those arguments were abandoned in its appeal to this Court. That case involved the five percent tax Illinois had placed on interstate long distance telephone calls. No commerce clause violation was found to exist. It was found that Ark. Code Ann. § 26-52-301(3) (Supp. 1987) satisfied the nexus test so that an interstate telephone call could be taxed.

The Wisconsin court in *GTE Sprint, supra* did not hold that any company was "placed at an unfair competitive disadvantage," as alleged by petitioners. Likewise, this issue was not raised below in this case.

The Supreme Court of Arkansas has properly determined that the equal protection clause was not violated in this case.

Petitioners have not raised an issue here which requires

review of this Court. Numerous other cases involving equal protection provide guidance concerning the taxation of electronic communication services, and this case does not rise to the level of importance required for review by this Court.

c. The Supreme Court of Arkansas fully considered the equal protection standards enumerated in this Court's prior decisions and correctly decided this case.

The fact that three cases challenging the imposition of state or local taxes based upon the Equal Protection Clause have resulted in upholding of those statutes reflects that

> great deference and wide latitude will be given by the Court to the state legislatures' decisions to create different classifications of taxpayers to meet local economic and regulatory needs; that the classifications will be presumed constitutional and approved if the Act advances a legitimate state purpose and the resulting classifications are reasonably related to that state purpose; that the classifications do not have to be drawn with mathematical precision; and, finally, that a heavy burden of proof is placed upon the challenging taxpayer to establish that the questioned classifications are palpably arbitrary and do not advance a legitimate state purpose. (Citations Omitted)

Pet. 16.

However, the Arkansas Supreme Court has *not* indicated in these three cases that it must "hypothesize" a legitimate basis that the legislature "could have considered" in these taxing statutes, as petitioners have alleged. (See Pet. 22) The

court did not reach the rational basis question in *City of Little Rock v. Waters*, 303 Ark. 363, 797 S.W.2d 426 (1990), because it determined there were no impermissible classifications. Therefore, no "hypothesizing" occurred in *Waters*. The court in *Streight v. Ragland*, 280 Ark. 206, 655 S.W.2d 459 (1983), carefully articulated its view on "hypothesizing" when it stated:

> In any event, the judiciary is allowed to hypothesize and we now reach a conceivable basis for the exemptions which we conclude are rational, reasonably distinctive and not arbitrary.
>
> 655 S.W.2d 464.

It added:

> Before it is said that such hypothesizing is far afield, we re-emphasize that our role is not to discover the *actual* basis for the legislation. Our task is merely to consider if *any* rational basis exists which demonstrates the possibility of a deliberate nexus with state objectives so that the legislation is not the product of utterly arbitrary and capricious government and void of any hint of deliberate and lawful purpose. Since we can reasonably conceive of lawful purposes for the state's classification scheme, it may not be held to have been arbitrarily enacted. (Emphasis the Court's.)

Id.

Therefore, the *Streight* court very carefully considered the standards set forth in prior cases of this Court. Likewise, the Arkansas Supreme Court in the case at hand applied the proper standards and reached the correct decision. Neither

Waters nor *Streight v. Ragland*, cited *Carmichael v. Southern Coal Co.*, 301 U.S. 495 (1937). However, the court in this case cited *Carmichael v. Southern Coal Co.*, after it had stated:

> A state has wide latitude in the exercise of its power of taxation. The power to tax necessarily implies the power to discriminate in taxation. The law does not dictate that taxing measures be applied to all members of a class or none. Distinctions are permissible, and if there is any conceivable set of facts to uphold the law's rational basis, it will be upheld. . . .

Pet. 12a.

The court did state it was "allowed to hypothesize the facts giving rise to the classification". *Id.*

This Court in *Carmichael, supra*, did not "hypothesize" although it stated:

> It [legislature] may make distinctions of degree having a rational basis, and when subjected to judicial scrutiny they must be presumed to rest on that basis if there is any conceivable state of facts which would support it.

Petitioners have cited *Allied Stores of Ohio v. Bowers*, 358 U.S. 522 (1959) to bolster their "objective" standard argument. However, this Court may be deemed to have "hypothesized" in that case.

The Arkansas Supreme Court went further to emphasize that its "task is to protect against classifications which are arbitrary and without reason". (Pet. 13a) It indicated that it has not abandoned this Court's standards when it quoted

City of New Orleans v. Dukes, 424 U.S. 297 (1976) for the proposition that it is "only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment". *Id.*

Petitioners have "submitted" that the Arkansas Supreme Court did not apply the second part of the rational basis test, namely, whether the classification was rationally related to the state's purpose. A reading of the opinion indicates otherwise. The court logically proceeded in its analysis by answering three questions:

> (1) Does the imposition of the tax discriminate against or among individuals?
>
> (2) If so, what standard is to be applied in testing the legitimacy of the law, a "rational basis" standard or one which requires the showing of a compelling state interest?
>
> (3) And, finally, does the statute meet the requisite standard? (Pet. 7A)

The court found a disparate treatment among "regular" long distance subscribers and WATS subscribers and held that the rational basis test was to be applied. *Id.* It then stated:

> The appropriate analysis, therefore, is whether there exists for the classification any rational basis which provides a "deliberate nexus with state objectives so that the legislation is not the product of utterly arbitrary and capricious government and void of any hint of deliberate and lawful purpose. (Citation omitted.)

Pet. 11a.

Therefore, the court viewed the classification in light of the rational basis for the legislation.

It appears that petitioners argue the small versus large customer in one breath, i.e. only "big business" can afford WATS or WATS-like services, and argue in the next breath that, if the legitimate state purpose was providing tax incentives to encourage business to stay and locate in this state, the legislature would have created two classifications —residential, which was taxed, and business, which was not taxed. Although petitioners argue that only large volume users subscribe to WATS or WATS-like services, no such evidence was submitted to the trial court. Therefore, the record does not reflect a distinction between low and high volume users.

"Telephone service is not telephone service is not telephone service." Even though the major and most apparent difference in basic interstate telephone service and WATS or WATS-like services may be in the rate structure, there are differences in transmission facilities, etc. Petitioners' "bootstrap" classification and "lack of mathematical precision exception" are misinterpretations of the case law cited. The statute is *not* based upon rate structure. Since petitioners have indicated they do not question the third category of service, private line services, they ignore the fact that the statute is based upon the type of services not rate structure. Differences in these three types of services existed at the time the legislation was passed, and these distinctions continue today.

Petitioners ask this Court to "accept the trial judge's invitation to reverse her decision". (Pet. 53a) Logically, a trial judge would not render a decision she believed to be

erroneous. The record, as a whole, and the Findings of Fact, Conclusions of Law, Order and Judgment of the Chancellor (Pet. 18a) reflect that a rational basis exists for the difference in tax treatment. Therefore, petitioners' invitation should be rejected.

II.

THE PETITION WAS FILED ON SEPTEMBER 27, 1991, MORE THAN NINETY DAYS AFTER THE ORDER OF THE ARKANSAS SUPREME COURT DENYING APPELLANTS' MOTION FOR RECONSIDERATION OF RECUSAL AND DISQUALIFICATION OF JUSTICES (DECEMBER 10, 1990) (PET. 4a) AND MORE THAN NINETY DAYS AFTER THE ORDER OF THE ARKANSAS SUPREME COURT DENYING APPELLANTS' MOTION (1) SUGGESTING DISQUALIFICATION OF ALL APPOINTED "SPECIAL JUSTICES", (2) FOR RECONSIDERATION OF RECUSAL OR DISQUALIFICATION BY ELECTED JUSTICES, OR, ALTERNATIVELY, (3) FOR OTHER RELIEF (APRIL 15, 1991) (PET. 16a) AND THE PERIOD FOR APPLYING FOR A WRIT OF CERTIORARI HAS NOT BEEN EXTENDED BY A JUSTICE OF THIS COURT.

Petitioners have admitted that "there is no other appeal from a refusal by a majority of a state appellate court to recuse at the request of one of the litigants." (Pet. 26) The denial of petitioners' motions were final judgments and more than ninety days passed before the Petition for a Writ of Certiorari was filed. Therefore, the Petition should be denied.

The order of the Supreme Court of Arkansas met the requirements set forth in *Department of Banking v. Pink*,

317 U.S. 264 (1942) because it "fully adjudicated rights and that that adjudication is not subject to further review by a state court".

The Supreme Court of Arkansas issued more than one judgment in this case. The due process argument raised concerning the "appointed" special justices is a completely separate subject from the equal protection controversy which surrounds Act 27 of 1987, and the judgments entered on December 10, 1990 and April 15, 1991 were final. *Mercantile National Bank of Langdeau*, 371 U.S. 555 (1963).

Therefore, this Court lacks jurisdiction in this matter and the Petition should be denied.

III.

THE DECISIONS OF THE SUPREME COURT OF ARKANSAS DENYING PETITIONERS' MOTIONS FOR RECONSIDERATION OF RECUSAL OR DISQUALIFICATION OF JUSTICES (December 10, 1990) AND SUGGESTING DISQUALIFICATION OF ALL APPOINTED "SPECIAL" ASSOCIATE JUSTICES, FOR RECONSIDERATION OF RECUSAL OR DISQUALIFICATION BY ELECTED JUSTICES, OR ALTERNATIVELY, FOR OTHER RELIEF DOES NOT CONFLICT WITH PRIOR DECISIONS OF THIS COURT.

a. Petitioners Have Erroneously Applied This Court's Ruling in *McKesson Corporation v. Division of Alcoholic Beverages & Tobacco*, 110 S.Ct. 2238 (1990) to The Facts of This Case.

Petitioners have quoted a portion of a statement from *McKesson, supra*, in an attempt to make the Due Process

Clause of the Fourteenth Amendment applicable to the refusal of Special Associate Justices to recuse, pursuant to petitioners' request. The holding in *McKesson, supra,* was very narrow and is not applicable to the facts here.

This Court in *McKesson, supra,* recognized that a state may choose a "predeprivation process", such as a suit to enjoin the collection of taxes prior to their payment. This method meets the "procedural safeguard" against unlawful exactions and satisfies the due process requirements.

The Court indicated, however, that a state is not required to provide this predeprivation process, but, if a state requires a taxpayer to object to a tax in a postdeprivation refund action, as did Florida in *McKesson, supra,* the state must provide taxpayers a "fair opportunity to challenge the accuracy and validity of their tax obligation". *Id.* 110 L.Ed.2d 37.

Arkansas law gives taxpayers an opportunity to challenge tax laws prior to the payment of tax through illegal exactions cases. This case was brought as a class action to enjoin, as an illegal exaction, the collection of taxes on basic interstate long distance services. Therefore, petitioners had a remedy other than a postdeprivation refund action, and the rationale and ruling in *McKesson, supra,* are not applicable here.

b. The Arkansas Code of Judicial Conduct Has Not Been Violated.

Petitioners have called Act 27 of 1987 an "administrative bill". The original "administrative bill" would have taxed *all* interstate long-distance telephone calls. (Pet. 3) However, the bill was amended three times. Petitioners have also alleged that AT&T lobbyists and legislative research personnel were

involved in the legislative process in Act 27. (Pet. 3, ftn. 1) Anyone can draft a bill, but they must get a sponsor and enough votes for it to pass.

The second point that petitioners make is that

> (2) the constitutionality of this Act has been defended by a political appointee within Governor Clinton's Executive Department; *Id.*

Petitioners brought this suit and named James C. Pledger, Commissioner of Revenues as a defendant. It is difficult to see the point made by petitioners, since defendants must defend or lose.

This case is no different than any other tax controversy involving the State of Arkansas. If the case is lost, the state will lose tax dollars. The relevance of statement 3, which appears on page 26 of the Petition, is questionable.

Petitioners have indicated that

> two of the special "appointed" justices' close family members had recently made substantial political contributions to Governor Clinton (which activity is prohibited by Canon 7A of the Code of Judicial Conduct).

Canon 7A (Pet. 48a) does *not* prohibit "close family members" from making political contributions to political parties, organizations or candidates.

Petitioners have not cited any precedent to support their implication that an individual cannot be appointed to serve as a special associate justice on more than one occasion within a given time frame. Justices have been appointed by Governor

Clinton in other cases in which the state has not prevailed. For instance, three justices were appointed in *Pledger, et al. v. Bosnick, et al.*, 306 Ark. 45, 811 S.W.2d 286 (1991), United States Supreme Court No. 91-375, Filed September 3, 1991, and the state was not the prevailing party. The three appointed justices joined one of the elected justices in the majority opinion. The three remaining elected justices dissented.

Article 7 § 9 of the Constitution of Arkansas provides the only constitutional method for the appointment of special judges. The Governor is to "commission the requisite number of men learned in the law to sit in the trial and determination of such cases." No other person or group of people (including the Supreme Court of Arkansas) is so authorized.

Petitioners asked the recusing justices to reconsider their recusals. Surely, the justices had a basis for their recusal, and it would be highly unlikely that it would change. Alternatively, petitioners asked the justices to state their reasons for recusal under Canon 3D of the Arkansas Code of Judicial Conduct —Remittal of Disqualification. Under Canon 3D a judge disqualified under Canon 3C(1)(c) or Canon 3(C)(1)(d) may disclose in the record his basis for disqualification. These deal with financial or other interests which could be substantially affected by the result of a case and personal or business relationships with parties, officers, directors or trustees of a party, etc. These do not include personal bias or prejudice; personal knowledge of the facts, etc. contained in 3C(a) or (b). Petitioners do not know why the justices disqualified themselves, and they are second guessing the justices by suggesting that there be a remittal of disqualifications.

Further, justices are not required to remit at the request

of a party (parties). The outcome of such remittance is also questionable since *all* lawyers and parties must agree, in writing, that the judge's relationship is immaterial or his financial interest is insubstantial.

The Code of Judicial Conduct does not require recusal merely because a party or lawyer alleges (1) the appearance of impropriety, or (2) independence or impartiality, as alleged by petitioners. In footnote 14, petitioners state, in pertinent part:

> . . . Canon 3 provides the general rule that a judge should disqualify in any proceeding where . . .. the question of impartiality or bias of a judge is raised;
>
> . . .

Where does Canon 3 state the above? Respondents are at a loss.

Do Canon 7 and the compliance provisions prohibit an attorney who might be considered for an appointment as a special justice from ever making a political contribution to a gubernatorial campaign or is the prohibition only when he is acting as a judge? If these innuendoes are carried to their logical conclusions, potentially absurd results would follow.

c. The Rule of Necessity is Applicable Here.

In footnote 16, Pet. 28, petitioners state that the rule of necessity [*United States v. Will*, 449 U.S. 200, 66 L.Ed.2d 392, 101 S.Ct. 471 (1980)] does not apply because several procedural methods for appointment exist.

The Constitution of Arkansas provides for one method of selecting special justices. If the governor is not permitted

to appoint justices, when elected justices recuse, in cases involving the State of Arkansas, who will hear the cases? Petitioners have not cited authority for the four alternatives suggested. (See Pet. 12 for the alternatives referred to by petitioners.) Since these cases must be heard and one method of appointment is constitutionally provided, the rule of necessity is applicable.

d. This Decision Does Not Conflict With Prior Decisions of This Court.

This factual situation is *not* "closely analogous to the one presented" in *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 89 L.Ed.2d 823, 106 S.Ct. 1580, Ann. 89 L.Ed.2d 1066 (1986), as alleged by petitioners.

In *Aetna, supra*, a justice of the Alabama Supreme Court had filed two actions against insurance companies, both alleging bad-faith failure to pay a claim, while a similar case was pending in the Alabama Supreme Court. One of the two cases involved insurance under a state employees' insurance plan, and all the justices of the Alabama Supreme Court were covered under this plan. The justice cast the deciding vote and authored the decision. Subsequent to that decision and while the request for rehearing was pending, Aetna learned of the other lawsuits.

Aetna filed two motions challenging the participation of the single justice and also alleging that all justices should recuse because of their interest as possible class members in the state employee health plan case. The justices refused to recuse, and, at the same time, also denied the motion for rehearing.

This Court decided *Aetna, supra*, on the basis that the

justice had "acted as a judge in his own case" and not on the basis of bias or prejudice. His interest was found to be "direct, personal, substantial [and] pecuniary". *Id.* Those facts are not present here.

The participation of the other justices did not require recusal under the Constitution. Further, this Court found that under the "rule of necessity," as set forth in *United States v. Will, supra,* none of these justices might have been required to disqualify. Even though these justices may have had some pecuniary interest, the Court "found it impossible" to characterize that interest as "direct, personal, substantial, [and] pecuniary". Likewise, the special justices here had no such interests.

The facts in *Tumey v. Ohio,* 273 U.S. 510 (1927); *In re Murchison,* 349 U.S. 133 (1955); *Ward v. Village of Monroeville,* 409 U.S. 57, 34 L.Ed.2d 267, 93 S.Ct. 80 (1972); and *Gibson v. Berryville,* 411 U.S. 564 (1973) are also distinguishable.

This Court in *Gibson v. Berryville, supra,* was decided on the basis of personal interest, i.e. pecuniary interest. The individual members of the Board of Optometry would receive additional business if an optical company was forced to suspend operations due to its ruling.

In *Ward, supra,* a mayor who also had responsibilities for revenue production and law enforcement, convicted *Ward* of two traffic violations and fined him. The city benefitted substantially from these fines. *Tumey, supra,* involved a factual situation similar to *Ward, supra,* but the mayor in *Tumey* also received compensation from the fines he levied.

A judge presided at contempt proceedings after he had

served as a "one-man grand jury" out of which proceedings the contempt charge arose in *In Re Murchison, supra.*

Not a single case cited by petitioners has similar factual situations to this case. Respondents submit that the "unreasonable" questioning of impartiality by petitioners is not a basis for invoking the protections of the due process clause. This Court has very clearly enunciated the standards necessary for a fair trial under the Due Process Clause of the Fourteenth Amendment, and, as it said so well in *Aetna, supra,* at 89 L.Ed.2d 831-832:

> not "[a]ll questions of judicial qualification involve constitutional validity." . . . See also ABA Code of Judicial Conduct, Canon 3C(1)(a) (1980) ("A judge should disqualify himself . . . where he has a personal bias or prejudice concerning a party"). But that alone would not be sufficient basis for imposing a constitutional requirement under the Due Process Clause.

Therefore, the due process arguments espoused by petitioners do not meet the requirements of Rule 10.1(c) of this Court, and the petition should be denied.

CONCLUSION

For the foregoing reasons, the Respondents submit that this Court should deny the Petition for a Writ of Certiorari to the Arkansas Supreme Court.

Respectfully submitted,

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October 30, 1991

(4)

No. 91-583

Supreme Court, U.S.
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In the

Supreme Court of the United States

OCTOBER TERM, 1991

HUGH H. BOSWORTH, JR., WALTER HENNINGSEN, MELISSA HENNINGSEN, IRENE E.SCOTT and HENNINGSENS, INCORPORATED, on behalf of themselves and all other similarly situated taxpayers,
PETITIONERS

v.

TIMOTHY J. LEATHERS, Commissioner of Revenues; et. al. PULASKI COUNTY, ARKANSAS; and the CITY OF FAYETTEVILLE, ARKANSAS; and all other similarly situated counties and cities; and AT&T COMMUNICATIONS OF THE SOUTHWEST, INC.; MCI TELECOMMUNICATIONS CORPORATION; U.S. SPRINT COMMUNICATIONS COMPANY; TMC OF ARKANSAS, INCORPORATED; LDDS OF ARKANSAS INCORPORATED; COMPUTE-A-CALL OF CENTRAL ARKANSAS, INCORPORATED, and all other similarly situated providers of long distance interstate and international telephone and telecommunications services,
RESPONDENTS

ARKANSAS TELEPHONE ASSOCIATION, INC.
INTERVENOR

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

BRIEF IN OPPOSITION BY RESPONDENT LDDS OF ARKANSAS INCORPORATED

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RULE 29.1 STATEMENT

LDDS of Arkansas, Incorporated (LDDS) is a regulated long distance telephone carrier, which corporation is organized and exists under the laws of the State of Mississippi with its headquarters and commercial domicile located at Jackson, Mississippi. LDDS is qualified, as a foreign corporation, to conduct business in the State of Arkansas. LDDS is a regulated interexchange carrier providing both intrastate and interstate long distance telephone and telecommunications services in the State of Arkansas.

LDDS has no subsidiary corporations and it is a wholly owned subsidiary of LDDS Communications Corporation, a Mississippi corporation with its headquarters and commercial domicile located at Jackson, Mississippi.

In 1989, LDDS acquired all of the assets of TMC of Arkansas, Inc. (TMC), and the interexchange intrastate and interstate telephone business previously conducted by TMC in Arkansas has thereafter been merged with that of LDDS.

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v.
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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

BRIEF IN OPPOSITION BY RESPONDENT LDDS OF ARKANSAS INCORPORATED

STATEMENT OF THE CASE

LDDS accepts the Statement of the Case as set forth in the Petition for Writ of Certiorari filed herein. However, with regard to the issue of the competitive pricing disadvantage at which the questioned sales tax statute places the nonfacility based interexchange carriers, LDDS wishes to supply the following additional information to supplement the Petitioners' Statement of the Case:

The language that the Arkansas General Assembly chose to use in Ark. Code Ann. § 26-52-301(3)(A)(iv)(c) to define the terms "interstate-wide area telecommunications

service or other similar services" (which telephone services are excluded for the sales tax base) is very ambiguous and has presented all long distance interexchange carriers with a problem of how to fairly administer this tax law. This problem has increased because of the ever evolving nature of the types of long distance interstate telephone services offered in Arkansas. In this regard, the then General Manager of TMC of Arkansas testified in this case (R. 236-239) that --

> Q (Mr. Sayre) I have placed in front of you a copy of the current statute that imposes the tax, Arkansas Code 26-52-306 (sic. 301) and the subsection 3(A) is the provision that applies the tax to telephone services. And, in particular, I draw your attention to the provisions which contain the exclusions in subpart (iv) and ask if you have examined those in making your determination of the types of services you have to apply the tax....to apply the tax to the types of services that TMC supplies?
>
> A (Mr. Carpenter) Again, I did not have this document at the time I made the decision as to what I would apply it to. Subsequently, I have reviewed this and, frankly, I have some difficulty with the definitions.
>
> Q Well, would you tell the Court what the problem is with the definitions?
>
> A Well, items (a) and (b) are fairly clear as they relate to private services, and we discussed that earlier. Item (c) attempted to describe the services that would be excluded. It says, "Any interstate wide area telecommunication service." Now, wide area telecommunication service is not capitalized,

it doesn't carry a trademark or any notation after that to indicate that we're talking about any specific product. And then it follows: "...or other similar services which entitles the subscriber to make or receive an unlimited number of communications to or from persons having telecommunication service in a specific area which is outside the state in which the station providing the service is located." Now, interpretation of that can be extremely broad. First of all, interstate wide area telecommunication service suggests WATS services, but it doesn't say that specifically. It says, a service where a customer is entitled to make or receive an unlimited number of communications. Well, to the best of my knowledge, none of the communication services set a limit on the number of transactions that you can make within a period of time.

Q With regard to that, some local exchanges you can buy a certain number of phone calls per month or per week, that type of situation. But the regular long distance service, the MTS service, does not make any restriction on the number of calls you can make, does it?

A Again, AT&T's DDD or MTS product, their basic service, our basic service, MCI's and Sprint's, to the best of my knowledge, have no limitation on the number of communications that a customer can make. In fact, we encourage them to make as many as possible, that's our business. And so, again, there is not....there is a suggestion or an inference, but someone could possibly make the interpretation when they say an unlimited number that it means an unlimited number for X

amount. But, as I said earlier, no one charges a base amount for up to this many calls. There are some new product out, primarily offered by AT&T in the residential market, that do have so many calls per month for a flat fee. But back to the reading of this, "...make or receive an unlimited number of communications to or from persons within a specific area..." I kind of modified that a little bit. It doesn't say what specific area, so a specific area could be the United States. Again, the suggestion might have been that they were talking about within a WATS band, but a specific area, again, our services within a specific area is the United States, Puerto Rico and the Virgin Islands. Traditional WATS service on a banded basis, you could call within the specific area that you had ordered service for and that was primarily on a line-by-line or bill-by-bill basis. Most of the new virtual services make that determination on a call-by-call basis, such as that if you call on one band on one call, you're charged the banded rate for that call, and if you call another band on the next call then you're charged the rate for that band. And that's where the term "virtual banded" came from. But, again, the exclusion for interstate wide area telecommunication services or other similar services essentially describes every type of service there is. And, in fact, probably describes basic service. So I'm not sure we should be charging tax even on basic service.

In addition, the Arkansas Revenue Division has never published any clarifying or interpretive regulations or guidelines for the long distance interexchange carriers to use in imposing these taxes upon the various types of interstate

long distance services that they offer to their customer-subscribers. (R. 228, 607) Due to the ever evolving technological changes that occur in the types of interstate telephone services offered by interexchange carriers and the ever changing rate structures authorized by the FCC and the Arkansas PSC, there exists a real problem for such long distance carriers to make sure that they are collecting the correct amount of sales taxes from their subscribers, while not imposing these sales taxes upon charges for their long distance interstate services that are similarly priced to their competitor's interstate telephone services.

Therefore, besides the discriminatory pricing differential on such carrier's basic MTS services (which basic services may be competitively priced with a facility based interexchange carrier's WATS and WATS-like services) that results from the classification made by the taxing statute, all interexchange carriers face a serious problem of trying, in good faith, to comply with the provisions of the 1987 amendment to Arkansas' sales tax law. Each interexchange carrier must interpret an ambiguous statute in trying to apply the sales taxes only to charges for those services that are intended to be taxed, out of the many different types of long distance interstate telephone services that are now offered by interexchange carriers to their Arkansas subscriber-customers.

In effect, each interexchange carrier is left to its own devices to try and comply with the provisions of the Arkansas sales tax law.

LDDS' RESPONSE TO THE PETITION

LDDS, as a nonfacility based interexchange carrier, does not object to the Court's granting of the Petition for a Writ of Certiorari to the Arkansas Supreme Court requested by the Petitioners. The first question presented by the Petitioners involving the Equal Protection Clause of the Fourteenth Amendment, addresses, in part, the practical discriminatory pricing situation that arises for all nonfacility based carriers, due solely to the provisions of the 1987 amendment to Arkansas' sales tax law.

LDDS agrees that the rationale of the decision and the statement of, and utilization of, the rational basis test by the Wisconsin Supreme Court in the case of *GTE Communications Corporation v. Wisconsin Bell, Inc.*, 454 N.W.2d 797 (Wis., 1990) appear to be in direct conflict with the decision of the Arkansas Supreme Court in this case. Therefore, there appears to be a direct conflict between the decisions of the highest courts of these two states on how the Equal Protection Clause of the Fourteenth Amendment is to be applied in situations where charges for similar telephone services are taxed differently by the same general sales tax.

Accordingly, LDDS, as a nonfacility based interexchange carrier, has no objection to this Court's granting of the Petition for Certiorari filed in this case by the Petitioners. LDDS believes that a decision by this Court on the Equal Protection question presented by the Petitioners will be of benefit to all long distance telephone companies and their subscribers in the administration of state sales tax laws that are not applied evenly to charges for all types of long distance interstate telephone services.

CONCLUSION

For the above-mentioned reasons, LDDS states it has no objection to this Court's granting of the Petition for a Writ of Certiorari in this case.

Respectfully submitted,

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v.

TIMOTHY J. LEATHERS, Commissioner of Revenues; JIMMIE LOU FISHER LUMPKIN, Treasurer of the State of Arkansas; FLOYD G. "BUDDY" VILLINES III, County Judge, Pulaski County, Arkansas; PATRICIA TEDFORD, Treasurer, Pulaski County, Arkansas; PULASKI COUNTY, ARKANSAS; and the CITY OF FAYETTEVILLE, ARKANSAS; and all other similarly situated counties and cities; and AT&T COMMUNICATIONS OF THE SOUTHWEST, INC.; MCI TELECOMMUNICATIONS CORPORATION; U.S. SPRINT COMMUNICATIONS COMPANY; TMC OF ARKANSAS, INCORPORATED; LDDS OF ARKANSAS INCORPORATED; COMPUTE-A-CALL OF CENTRAL ARKANSAS, INCORPORATED, and all other similarly situated providers of long distance interstate and international telephone and telecommunications services,
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ARKANSAS TELEPHONE ASSOCIATION, INC.
INTERVENOR

PETITION FOR A WRIT OF CERTIORARI TO THE ARKANSAS SUPREME COURT

PETITIONERS' REPLY BRIEF TO RESPONDENTS' BRIEFS IN OPPOSITION

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REASONS FOR GRANTING THE WRIT

Briefs in Opposition to the Petition for a Writ of Certiorari were filed by the Arkansas Commissioner of Revenues (on behalf of himself and the two local governmental entities), by US Sprint Communications Company, and by LDDS of Arkansas, Incorporated. AT&T Communications of the Southwest, Inc. filed only letter responses with the Clerk. The Petitioners' responses to the points raised in each of these Briefs will be discussed below.

A. Equal Protection Clause Issue

1. Briefs of US Sprint Communications and the Commissioner of Revenues

The members of this Court should disregard US Sprint's belabored attempt to obfuscate the real conflict that exists, for Equal Protection purposes, between the decision of the Wisconsin Supreme Court in *GTE Sprint Communications v. Wisconsin Bell*, 454 N.W.2d 797 (Wis., 1990) and the decision of the Arkansas Supreme Court in this case. The exercise in "blue smoke and mirrors" engaged in by US Sprint in its brief (pp. 1–9), in citing virtually every exemption in both the Arkansas and Wisconsin Sales Tax Codes (while trying to portray a substantive difference between the classifications drawn by the challenged state Sales Tax statutes in the two cases), is not germane to the Equal Protection issue presented by the Petitioners. That question is whether the Wisconsin court applied "objective standards" (required by this Court's prior Equal Protection decisions), while the Arkansas Supreme Court failed to apply such "objective standards," and, instead, erroneously adopted a standard that it has a duty to "hypothesize" a legitimate state purpose for the questioned statute.

The only *real* difference in the facts in Wisconsin's *GTE Sprint Communications* case, and the facts in this Arkansas case, is that the discrimination between the classification of taxpayers in the Wisconsin case was between telephone companies; and, in this case, it is between telephone subscribers. In the *GTE Sprint* case, the reseller, LEC and IXC telephone companies *all* had to purchase "access services" to complete their long distance calls. The access

services purchased by IXC's were specifically subjected to Wisconsin's Sales Tax, while the purchases of the same access services by resellers and LEC's were excluded from the Wisconsin Sales Tax base. Here, the purchase of long distance interstate telephone services by MTS subscribers (represented by the Petitioners) are taxed by Arkansas, while the same long distance interstate services that are purchased by WATS and WATS-like subscribers are excluded from the Arkansas Sales Tax base. Undeniably, *both* MTS and WATS interstate long distance services use the same equipment to transmit the same voice, image or data messages. The Petitioners submit that the rather herculean attempts by US Sprint and the Commissioner (Br. 9-13 and Br. 5-9) to differentiate the facts and rationale adopted in the Wisconsin and Arkansas cases were for naught; since they are exercises that result in a distinction without a difference. [1]

In this case, the Arkansas Supreme Court simply failed to properly apply the two part rational basis test mandated by this Court's prior decisions. Instead, that court's decision has "blurred" the required application of this two part minimal scrutiny test by "hypothesizing" that there is a legitimate state purpose here by what amounts to the use of "an ends justifies the means rationale." Both US Sprint and the Commissioner have compounded the problem in their Opposition Briefs by trying to offer strained explanations to justify the holding of the Arkansas court.

To correctly apply the rational basis test, this Court's

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[1] It is most interesting to note the comparison between the Equal Protection rationale argued by US Sprint in its Brief in Opposition here, and the representations this carrier made on brief before the Wisconsin Supreme Court in the *GTE Sprint* case, when this carrier's own economic interests are differently affected. Besides establishing a competitive pricing advantage for US Sprint, AT&T and MCI in Arkansas, the provisions of § 2 of Act 27 of 1987 are also providing these carriers with a substantial cash flow from their statutorily forced collection actions, which cash flow resulted from a mere resetting of their billing computers. Why else would US Sprint (who should be a mere stakeholder in this case) try so hard to defeat the Petitioners' Equal Protection challenge?

decisions require that a state court must first determine if a legitimate state purpose is being served by the discriminatory exception in the taxing statute. *Then*, secondly, the court must determine if the classification of taxpayers created by the challenged statute is rationally or reasonably related to the legitimate state purpose determined in the first step of this test. If there is either (1) no legitimate purpose served by the statute, or (2) if the statutory classification is found palpably arbitrary and not rationally related to the legitimate state purpose, then the challenged tax statute fails the requirements of the Equal Protection Clause and must be declared unconstitutional. *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985); *Zobel v. Williams*, 457 U.S. 55 (1982); and *Stewart Dry Goods Co. v. Lewis*, 294 U.S. 550 (1935).

In the instant case, *both* the trial court (Pet. 24a, 51a–53a) and the Arkansas Supreme Court (Pet. 12a) correctly found (from both the face of the statute and the evidentiary record) that the classification of taxpayers created by § 2 of Act 27 of 1987 was designed to encourage the high volume use of interstate long distance telephone service. Thus, this encouragement of a high volume of use of interstate telephone service is the *only* state purpose either court found for the discriminatory classification in this questioned tax statute. The Petitioners submit that the encouragement of a high volume of interstate telephone service is *not* a legitimate state purpose (for Equal Protection/rational basis test purposes), and that these courts' inquiries should have ended there, with § 2 of Act 27 of 1987 being held unconstitutional.

However, *both* Arkansas courts then deviated from the correct application of the rational basis test, and (working backwards from the evidentiary finding that subscribers to WATS and WATS-like services were more likely than not to be businesses) held that the "purpose" of the challenged statute was to promote and encourage businesses to locate and remain in Arkansas (an admittedly legitimate state purpose). If, in fact, the encouragement of businesses to stay or locate within Arkansas was the legitimate state purpose for § 2 of Act 27 (i.e. the first part of the rational basis test); the Petitioners have steadfastly maintained

that the statute's classification of MTS and WATS subscribers totally fails the rationally or reasonably related (second part) of the rational basis test, because all *business* subscriber-taxpayers within the classification created by the statute are *not* treated the same.

All *business* subscribers to interstate telephone services are *not* treated the same by this statute, because *business* subscribers (like Petitioner Henningsens, Inc.) with a small volume need or usage of interstate long distance services are not benefitted by the tax statute's exception for WATS and WATS-like services. There is no regulatory restriction placed upon a residential subscriber's ability to use WATS and WATS-like interstate services. [2] Also, this classification between MTS and WATS service subscribers created by the Arkansas statute does not come within the lack of mathematical accuracy exception that is applicable to this second part of the rational basis test merely because it is more likely than not that a WATS service subscriber will be a business. Therefore, the Petitioners maintain that the classification created by this Arkansas tax statute is as palpably arbitrary as those classifications that were found by this Court to have violated the Equal Protection Clause's limitations in the *Hooper, Zobel* and *Stewart Dry Goods* cases.

The improper application (or lack of application) of the "objective standards" of the rational basis test by these Arkansas courts, and their adoption and use of a "subjective hypothesizing" duty to uphold the taxing statute, must be rectified by this Court's granting of this Petition for Certiorari, so that this Court can denounce such practices that directly conflict with the Wisconsin Supreme Court's proper and correct application (in its *GTE Sprint Communications* decision) of the federally mandated Equal Protec-

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[2] In fact, the Counsel of Record for the Commissioner, during oral argument before the Arkansas Supreme Court, gave only one example to justify this statutory classification; and this example involved a *residential* subscriber's use of WATS or WATS-like interstate service to stay in regular touch with a child who was attending an out-of-state college.

tion Clause standards.

Therefore, the Petitioners submit that US Sprint's characterizations of the Arkansas and Wisconsin cases as being "radically different Equal Protection challenges" (p. 13) is erroneous, and that that carrier's academic exercise in trying to classify the Wisconsin exception as a "retail-wholesale" exception, while the Arkansas statute's exception is a "policy" exception, is a distinction without difference for Equal Protection Clause analysis purposes in these two cases.

Petitioners contest the Commissioner's assertion that WATS service is a "flat rate" long distance service (p.2). WATS interstate service charges (like Private Line Service charges) were once a "flat rate" charge. However, the stipulations of the parties (R. 14) and the testimony of Mr. Carpenter, the General Manager of TMC of Arkansas (R. 225-227 and 577-582), have dispositively established in this case that though there is a monthly flat charge "associated" with WATS service, the actual charge for the usage of WATS and WATS-like services is based upon time of day, day of week, length of message and length of call; as are the charges for MTS interstate service. Further, the Petitioners submit that the Commissioner's factual assertion that calls made by WATS subscribers beyond the geographic band, and calls made by credit card or with operator assistance by WATS subscribers will all be billed as "MTS charges" (p. 2), is the best evidence that the only true difference between MTS interstate telephone service and WATS and WATS-like telephone services is the FCC and PSC approved pricing differential for these services, especially since both types of interstate service use the same equipment to transmit the same types of messages.

Also, the Commissioner has misstated to this Court the rationale adopted by the Illinois intermediate appellate court in *Satellink of Chicago, Inc. v. City of Chicago*, 523 N.E.2d 13 (Ill. App. 1 Dist., 1988), when he states (p. 7) that that court did not apply the rational basis test for Equal Protection purposes. In the *Satellink* case, the Illinois courts specifically held (423 N.E.2d, at

17): "The amendment does not withstand any Equal Protection challenge *regardless of the degree of scrutiny employed.*" Thus, it is clear that the rational basis test, as well as the heightened scrutiny test, was considered by this Illinois intermediate appellate court in reaching its decision that the taxing ordinance violated the Equal Protection Clause.

The Petitioners disagree that the question presented by their Petition is not important enough for review, as asserted by the Commissioner (pp. 9–10). This same type of disparate treatment of similarly situated taxpayers was sufficient, for Equal Protection Clause purposes, to have generated a $73.0 million refund by the Wisconsin Supreme Court in the *GTE Sprint* case, and now two other states have adopted a similar statutory pattern for imposing Sales Taxes on charges for MTS interstate service, but excepting charges for WATS and WATS-like interstate services from the same tax. This Court, in last term's decision in *Leathers v. Medlock*, 111 S. Ct. 1438 (1991), thought the disparate tax treatment of similarly situated consumers of electronic communications services was sufficiently important (for Equal Protection purposes) to specifically remand that issue to the Arkansas Supreme Court for consideration. This issue is now pending on a post-remand briefing schedule in that case. The Petitioners submit that the disparate Sales Tax treatment the Petitioners received as MTS subscribers clearly rises to the level of "invidious discrimination" that is required by this Court's prior decisions. Webster's Ninth New Collegiate Dictionary defines these terms as "to distinguish one object from another, which act would tend to cause discontent, animosity or envy." Petitioners submit that the indignation reflected by the testimony of Petitioner Irene Scott, a widowed school teacher living on a pension (see App. K, 54a, *infra*), sufficiently establishes that the discriminatory classification drawn by § 2 of Act 27 of 1987 (between MTS and WATS subscribers) has created a difference in the taxing of similarly situated citizens that has caused substantial resentment among Arkansas' taxpayers who are MTS service subscribers.

The Petitioners therefore submit that neither US Sprint nor

the Arkansas Commissioner of Revenues have submitted sufficient arguments to rebut the reasons stated in their original Petition as to why this Court should grant this Petition for Certiorari and review and reverse the erroneous application of the Equal Protection Clause standards used by the Arkansas Supreme Court in this case.

2. Brief of LDDS of Arkansas, Incorporated

LDDS, as a nonfacility based carrier that has suffered a competitive pricing disadvantage in the sale of its long distance interstate services (because of the classification created by § 2 of Act 27 of 1987), has contributed substantially to the evidentiary record in this case, through the testimony of Mr. Carpenter, its General Manager. Mr. Carpenter testified about the problems of implementing this Sales Tax (because of the ambiguous wording of the statute), as well as the competitive pricing disadvantage suffered by nonfacility based IXCs, as compared to the "facility based" IXCs, like AT&T, MCI and US Sprint. [3] The Petitioners

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[3] It is interesting to note that both AT&T and MCI, as facility based IXCs, have defaulted on the opportunity to file a Brief in Opposition in this case. However, the members of this Court should be aware that, in the Pulaski County Chancery Court, AT&T, MCI and US Sprint actually took the lead in attempting to defeat the Petitioners' constitutionally based challenge. In fact, these three facility based carriers filed a total of more than 130 pages of pleadings, motions and briefs in the trial court in an attempt to defeat the Petitioners' challenge, while all of the state and local government agencies involved filed less than 30 pages of similar materials. AT&T, MCI and US Sprint all filed briefs before the Arkansas Supreme Court attempting to defeat the Petitioners' appellate challenge. Also, AT&T's counsel utilized half of the Appellees' oral argument time before the Arkansas Supreme Court in trying to dissuade the members of that court from favorably receiving the Petitioners' challenge. Therefore, the Petitioners question why such vigorous actions have been taken by these three facility based carriers before the Arkansas courts to try to defeat the Petitioners' Equal Protection challenge (when such carriers would normally be thought of as mere "stakeholders" as "forced collectors" of the challenged tax), unless there is some vitally important economic interest (e.g. a competitive pricing advantage) that all of these "facility based carriers" are seeking to protect by having the constitutionality of § 2 of Act 27 of 1987 upheld.

submit that the representations of LDDS provide further reason why the members of this Court should review this important constitutional question presented by their Petition.

B. Due Process Clause Issue

Only the Commissioner of Revenues has addressed the second question raised by the Petitioners involving the denial of their Due Process rights guaranteed by the Fourteenth Amendment. This situation was created by Governor Clinton's special appointment of a "majority" of the members of the Arkansas Supreme Court who then passed upon the Petitioners' constitutional challenge to the Governor's own "administration bill."

Initially, the Petitioners maintain that the Commissioner's assertion (pp. 16–17) that the Arkansas Supreme Court's orders of December 10, 1990, and April 15, 1991 (denying the Petitioners' motions to remit or to recuse) were final and appealable orders is totally erroneous. Though the Due Process question here arose at the Arkansas Supreme Court level (rather than at the trial court), the same rationale regarding the lack of finality of decisions on motions to recuse by trial judges is equally applicable here. The nearly universal rule in this area of the law is that a judicial official's orders denying recusal motions are reviewable *only* after a final judgment has been rendered on the merits of the substantive issue presented. For an exhaustive annotation of decisions on this point, see the compilation of cases contained in the *Review of Federal Judges Grant or Denial of Motion to Recuse*, 64 A.L.R. Fed. 433. For this Court to accept the procedural position proffered by the Commissioner on this issue would create a situation where there is total uncertainty for litigants as to when they must file Petitions for Certiorari. This Court would, therefore, be flooded with such Petitions. The provisions of 28 U.S.C. § 1257 do not even imply the standards suggested by the Arkansas Commissioner, and such suggestion as to final orders also runs afoul of

the rationale of this Court's Rule 13.1 and 13.4. Therefore, the Petitioners maintain that this legal position taken by the Commissioner is meritless and should be disregarded by the members of this Court in their consideration of this important Due Process issue.

The Commissioner's limitation of the rationale of this Court's "fair opportunity to challenge" standard, declared in the Court's recent decision in *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 110 S. Ct. 2238 (1990) is unnecessarily restrictive and erroneous. This Court has previously held that "due process is flexible and calls for such procedural projections as the particular situation demands" (*Matthews v. Eldredge*, 424 U.S. 319 at 334 (1976)). The Petitioners submit this concept guarantees that they have a fair opportunity to be heard by an appellate panel of justices who are free from even the appearance of impropriety.

The procedural record in this case clearly establishes that Act 27 of 1987 was an "administration bill" sponsored by Governor Clinton and his staff in the 1987 regular session of the Arkansas General Assembly. When Governor Clinton was presented with the direct conflict of interest in appointing the majority of the court that was to pass upon the constitutionality of § 2 of Act 27 of 1987, the Petitioners presented their timely objections based upon the violation of their Due Process rights and presented either three or four separate procedures that were available to Governor Clinton (at least a *de facto* litigant in this case) to avoid this constitutional crisis. However, neither the Governor nor the "elected" members of the Arkansas court chose to exercise those options. Thus, the appointment of these special justices by Governor Clinton created a situation that brought the independence of the judiciary seriously into question and threatened the separation of powers required by the state constitution.

Finally, the Commissioner mistakenly or erroneously restates (p. 21) the "general rule" set forth in Canon 3C(1) of the Arkansas Code of Judicial Conduct, regarding the obligation of the special "appointed" justices of the state court to recuse when a

question was raised on a reasonable ("objective") basis as to their impartiality or possible personal bias or prejudice in this case. The Petitioners have cited the contemporaneously recorded comments of the Reporter of the ABA Committee that promulgated this 1972 Code, regarding this "general rule" of Canon 3C in their Petition (Pet. p. 28, ftnt. 15) which states that the justices should recuse under this "general rule." Accordingly, as former Justice Black stated in *In Re Murchison*, 349 U.S. 133, at 136 (1955): "to perform its high function in the best way, justice must satisfy the appearance of justice." Even the "appearance of impropriety," as set out in Canon 2 of the Arkansas Code of Judicial Conduct, should have clearly provided these special "appointed" justices with sufficient reason to have honored the Petitioner's request that they recuse.

Therefore, the Petitioners submit that they have presented an important Due Process question that can only be resolved by this Court's exercise of its general supervisory powers over the state (as well as the lower federal) courts, so as to assure the Petitioners that they have a "fair and objective panel" to review their Equal Protection challenge to § 2 of Act 27 of 1987.

CONCLUSION

For the reasons set forth in this Reply Brief, as well as their original Petition, the Petitioners submit that this Court should grant their Petition and answer the important Equal Protection and Due Process questions presented in this case.

Respectfully submitted,

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APPENDIX K

TRIAL TRANSCRIPT (R. 420–422, and 508)

(Transcript of questions and answers by Petitioner Irene Scott regarding her reasons for being a representative party in this class action suit)

MR. SAYRE: And would you tell the Court why you are a plaintiff in this lawsuit?

MRS. SCOTT: Yes. I'm just representing the typical residential user. I'm a widow and I have a pension, and so I have to kind of watch my funds. And people that I have met in clubs and things that I belong to, they haven't been, you know, noticing that they were paying the tax either, and they really got upset when I told them that that's what was happening.

* * *

MR. SAYRE: By bringing this challenge to the sales tax, are you in any way trying to knock out the exclusion and extend the tax to those types of services?

MRS. SCOTT: No, I just feel that the tax is not fair.

* * *

MR. SAYRE: Mrs. Scott, why have you filed this claim and solicited these claims from the other four hundred and twenty-five claimants?

MRS. SCOTT: Because I think that the tax is probably illegally charged to us taxpayers that have had to pay for the out of state calls. And I also think it's unfair that 1-800 numbers didn't have to pay it.

* * *